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CHRONOLOGY OF PROCEEDINGS

THREE JUDGE COURT 4-2-73 (ABR) (RBW) (JMW)

CIVIL DOCKET

UNITED STATES DISTRICT COURT **C** Jury demand date:

D. C. Form No. 106A Rev.

73-688

TITLE OF CASE	CLASS ACTION	ATTORNEYS
MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY VS HON. EDWIN EDWARDS, GOVERNOR OF LA., HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL, A.B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM; all defts are sued both in their official and individual capacities	*Additional parties listed on attached sheet	For plaintiff: (1) William E. Rittenberg Debra Millenson American Civil Liberties Union of La. 606 Common St. N.O.,LA. 522-0617 - 525-4961 (2) Ruth Bader Ginsburg Columbia University Law School New York, New York 10027 (3) SYLVIA ROBERTS NOW LEGAL DEFENSE AND EDUCATION FUND P.O. Box 3081 Baton Rouge, La. (5) George M. Strickler, Jr. 1110 Royal St. N.O., LA. 524-2237 For defendant: (4) Warren E. Mouledoux First Asst. Atty. General State Capitol Baton Rouge, La. (6) Dale C. Wilks Robert L. Danner, Jr. 234 Loyola Ave. Room 815 N.O., LA. (7) Louis A. Gerdes, Jr. 234 Loyola Ave. 7th Floor N.O.,LA.

STATISTICAL RECORD	COSTS			DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed	Clerk			3-16-73	American Civil Liberties Union		15.00
				3-19-73	CD# 94		15.00
J.S. 6 mailed AUG 1973	Marshal			10-12-73	State of La.	$5 00	
				10-16-73	CD#38		$5 00
Basis of Action: Rule 23 Allegation; Pet. for pramanent and temporary injunctions allowing pltfs. to sit on jury duty	Docket fee						
	Witness fees						
Action arose at:	Depositions						

C 73-688

DATE	PROCEEDINGS	Date Order or Judgment Noted
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3-16-73	Pltfs. request for three Judge Court.	2
3-22-73	M.R. on summons served Edwin Edwards on 3-20-73.	3
3-26-73	Mtn and ORDER (ABR) that defts is granted an extension of 30 days to file responsive pleadings. 3-27-73.	4
3-29-73	M.R. on summons served Victor Grantham on 3-22-73.	5
3/29/73	M.R.'s on summs. to: Dalos Fussell, served thru wife; Hon. Thos. Tanner, served thru E. Jenkins 3/22/73; A.B. Crow, served thru Ms. Smith 3/23/73; Hon. Wallace Edwards, served thru J. Nettles 3/23/73; Hon. Hilary J. Crain, served thru Ms. I. Brumfield 3/22/73; Robt. Fitzmorris, served thru Bea Erwin 3/22/73; Billy Weaver, served thru his son, Billy Jr., 3/22/73.	6
4-2-73	ORDER (Judge John R. Brown) designating a three judge Court; (ABR) (RBW) (JHW).	7
4-19-73	M.E. of 4-19-73; (ABR) a conf. was held 4-16-73; mtn to determine class is to be brought for hearing on 5-23-73 10am.	8
4-25-73	Defts. mtn to dismiss; hearing 5-9-73 10am.	9
5-1-73	M.E. of 5-1-73; (ABR) all mtns will be heard 5-9-73 9am.	10
5-7-73	Pltfs. mtn and ORDER (ABR) that George Strickler, Jr. be associated is this action. 5-4-73. ent 5-7-73.	11
5-7-73	Mtn and ORDER (ABR) hte hearing on defts mtn to dismiss be continued to 5-23-73 9am.	12
5/23/73	Hrg. of mtn. to determine class action & defts. mtn. to dismiss; CONTINUED til 5/30/73. (ABR) Ent. 5/25/73.	13
5-30-73	HRG on motion of deft to dismiss & To determin class - cont to 6-13-73 at 9am.	14
5-30-73	Motion of Shirley Ann Robinson & Jenny Lee Smith Baggett to intervene and to join parties deft; HRG set for 6-13-73 at 9am.	15
5-30-73	Plft's cross motion for summary judgment; HRG set for 6-13-73 at 9.	16
6/4/73	N.E.: 3-jdgm hrg. set 6/11/73 RESET for 7/6/73, Judge Boyle's Courtroom. (ABR) 6/1/73. Ent. 6/5/73.	17
6-11-73	Memorandum for defts with respect to definition of the classes and absence of notice requirement.	18
6-12-73	Memorandum in support of defts motion to dismiss and in opposition to plft's cross-motionfor summary judgment.	19
6-13-73	HRG On Motion of defts to dismiss - to be decided by 3 judge court; Motion to intervene by Shirley Robinson & J. l. S. Baggett - Granted	20
6/25/73	Pretrial ORDER. (No trial date set, date of conf. not indicated). (ABR)Ent. 6/27/73.	21
6/25/73	Pltfs. stipulation of facts.	22
6/28/73	ORDER allowing intervention of Baggett & Robinson, pltfs. & intervenors allowed to file amended complt. & complt. of intervention. This is proper CLASS ACTION. (ABR) Ent. 6/29/73.	23

SHEET # 2

C. A. 73-688 C

D. C. 110A Rev. Civil Docket Continuation

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7-2-73	Amended complaint & complaint in Intervention, Issued (5) summons.	24
7-6-73	HEARING: Submitted.	25
8-31-73	OPINION:(ABR 8-31-73)	26
8-31-73	JUDGMENT: as per hearing; ORDER judgment in favor of pltfs Marsha B. Healy, Suzanne D. Hill, Carolyn Hall, Linda Walz, Charles W. Hill, J. A. Walz and John J. Healy, and against defts Hon. Edwin Edwards, Vog of La., Hon Thomas W. Tanner, Hon. Wallace A. Edwards, Hon. H. J. Crain, of 22nd Judicial Dist Court Delos Fussell, A. B. Crow, Billy W. Weaver, R. Fitzmorris and Victor Grantham, declaring Louisiana Jury Selection System whereby women may not serve on juries w/o filing a written declaration of their desire to do so unconstitutional. (ABR 8-31-73 ent 9-4-73) CLOSED CASE	27
9-6-73	M.E. Opinion of 8-31-73 is amended as follows: Defts are hereby enjoined from enforcing the constitutional and statutory provisions declared to be unconstitutional.(ABR, JM Wisdom, Blake West 9-6-73 ent 9-6-73)	28
9-10-73	Defts' mtn to stay execution of judgment pending appeal.ORDER granting that judgment be stayed until defts' appeal to the Supreme Court is disposed of. (ABR 9-10-73; West & Wisdom 9-10-73)	29
9-7-73	M.E. In the opinion dtd 8-31-73 on page 5 para 3, line 3, "seven should be "eight" (ABR, Wisdom and Blake 9-7-73)	30
9-7-73	Amended Judgment: in favor of pltfs and against defts declaring La. Jury Selection System whereby women may not serve on juries w/o filing a written declaration of their desire to do so unconstitutional and defts are enjoined from enforcing the constitutional and statutory provisions declared to be unconstitutional.(ABR, JMW, RBW 9-7-73 ent 9-10-73)	31
9-17-73	Ltr from Atty. Ginsburg stating new address.	32
9-18-73	Notice of appeal.	33
10-30-73	Transcript of proceedings on July 6, 1973 before Honorable John Minor Wisdom, Honorable Alvin B. Rubin and Honorable R. Blake West.	34
10-30-73	Orig record and transcript forwarded to Court of Appeals.	X
11-1-73	Record in its entirety returned from Court of Appeals; to be forwarded to Supreme Court.	X

SHEET #2

C.A. 73-688

HEALY v. EDWARDS, et al

D.C. 110A Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Order or Judgment Noted
	ADDITIONAL PARTIES	
	INTERVENORS: Shirley Ann Robinson Jenny Lee Smith Baggett	
	DEFENDANTS: John Wood Marvin Williams Harold Foil Preston Varnado Dewaine Seal	

POOR COPY

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

[illegible] MALY, SUZANNE P. HILL, CAROLYN [illegible]ILL, LINDA WALZ, CHARLES M. HILL, [illegible], WALZ AND JOHN J. MALY	CIVIL ACTION
versus	73-633
HON. EDWIN EDWARDS, GOVERNOR of LOUISIANA, HON. THOMAS M. TAMBURO, HON. WILLIAM J. GUIDRY, HON. HILLERY J. CRAIN, JUDGES of the 22nd JUDICIAL DISTRICT COURT, JULES RUSSELL, A.D., CLERK, BILLY M. [illegible], SHERIFF CITY OF [illegible], VICTOR [illegible]; ALL DEFENDANTS ARE SUED BOTH IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES.	SECTION

SECTION "[illegible]"

COMPLAINT

I. Preliminary Statement

Plaintiffs, individually and on behalf of all persons similarly situated, seek to have this court declare unconstitutional and enjoin the enforcement of Article 402 of the Louisiana Code of Criminal Procedure, Louisiana R.S. 13:3055, and Section 41 of Article 7 of the Louisiana Constitution, provisions that exclude from jury service all women who do not file with the Clerk of the Court a written declaration of their desire to serve as jurors. These provisions are challenged on the ground that they deny to women and men the equal protection of the laws safeguarded to all persons, male and female alike, by the fourteenth amendment to the United States Constitution.

Consonant with the dual aspect of jury service in our constitutional system -- it is at the same time a fundamental right and a fundamental responsibility of citizenship -- the named plaintiffs represent two classes: (1) the female class, persons whose right to serve on juries is conditioned on a registration requirement not imposed on similarly situated males, whose own [illegible] litigants before juries on which members of their sex are represented is drastically curtailed, and whose

exclusion from responsibility to serve on juries sets them apart as subordinate citizens; (2) the Male Class, persons subject to a disproportionate obligation to serve on juries because similarly situated females are excluded from service.

II. Jurisdiction

1. This is a class action arising under the fourteenth amendment to the Constitution of the United States and 42 U.S.C. §1983. Jurisdiction is conferred on this court by 28 U.S.C §1343 (3),(4) which authorize adjudication and the injunctive relief sought herein. Declaratory relief is sought pursuant to 28 U.S.C. §§2201 and 2202. A three-judge court is required under 28 U.S.C. §§2281 and 2284.

III. Plaintiffs

A. Female Class

2. The named plaintiffs, Marsha Healy, residing at 420 Carroll, Mandeville, Louisiana 70448, Suzanne D. Hill, residing at RR5, Box 61, Covington, Louisiana 70433, Carolyn Hull, residing at Post Office Box 81, Madisonville, Louisiana and Linda Walz, residing at 420 Carroll Street, Mandeville, Louisiana are female citizens of the United States and of the State of Louisiana. Each of the named female plaintiffs is over the age of 21 years, literate in the English language, not under interdiction or otherwise incapable of serving as a juror because of a mental or physical infirmity, not under indictment and has never been convicted of a felony.

B. Male Class

3. The named plaintiffs, Charles W. Hill, residing at Route 5 Box 61, Covington, Louisiana, Jerry A. Walz, residing at 100 Bernay Drive, Slidell, Louisiana and John J. Healy, residing at 420 Carroll Street, Mandeville, Louisiana, are male citizens of the United States and of the State of Louisiana. Each of the named male plaintiffs is over the age of 21 years, literate in the English language, not under interdiction or otherwise incapable of serving as a juror because of a mental or physical infirmity, not under indictment and has never been convicted of a felony.

IV. Class Action

4. The plaintiffs named in paragraph (2) hereof bring this action on their own behalf and, pursuant to Rule 23(a) and (b) (2) of the Federal Rules of Civil Procedure, on behalf of all persons similarly situated, such persons being female residents of St. Tammany Parish eligible for jury service pursuant to Louisiana Code of Criminal Procedure Art. 401, but excluded from such service unless they declare their desire to serve pursuant to Louisiana Code of Criminal Procedure Art. 402. The requirements of Rule 23 are met in that the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative female plaintiffs are typical of the claims of the class; and the representative female plaintiffs will fairly and adequately protect the interests of the class. Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

5. The plaintiffs named in paragraph (3) hereof bring this action on their own behalf and, pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, on behalf of all persons similarly situated, such persons being male residents of St. Tammany Parish eligible for jury service pursuant to Louisiana Code of Criminal Procedure Art. 401, and subject to a disproportionate obligation to serve by reason of the exclusion of women from service pursuant to Louisiana Code of Criminal Procedure Art. 402. The requirements of Rule 23 are met in that the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative male plaintiffs are typical of the claims of the class; and the representative male plaintiffs will fairly and adequately protect the interests of the class. Defendants have acted on grounds generally applicable to the class thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

V. Defendants

6. Defendant Edwin Edwards is the Governor of the State of Louisiana and, as chief executive of the State, is charged with responsibility for execution and administration of the laws of the State of Louisiana.

7. Defendants, the Honorable Thomas W. Tanner, residing in Slidell, Louisiana 70458, the Honorable Wallace A. Edwards, residing in Covington, Louisiana 70433, and the Honorable Hilary J. Crain, residing in Franklinton, Louisiana 70438, are Judges of the 22nd Judicial District Court of the State of Louisiana, and are charged with the responsibility of appointing four of the jury commissioners of that district pursuant to Louisiana Code of Criminal Procedure Art. 404.

8. Defendants Delos Fussell, residing at Bush-Folsom Road, Covington, Louisiana 70433, A.B. Crow, residing at 1330 Front Street, Slidell, Louisiana, Billy W. Weaver, residing at Chandler Drive, Abita Road, Covington, Louisiana, and Vincent Grantham, residing at Bush, Louisiana, are members of the Jury Commission of St. Tammany Parish. As members of the Jury Commission, defendants Fussell, Crow, Weaver and Grantham are charged with the responsibility of selecting the persons who shall constitute the general venire of St. Tammany Parish in accordance with Louisiana Code of Criminal Procedure Art. 410, and of selecting the grand jury venire and petit jury venires of St. Tammany Parish pursuant to Louisiana Code of Criminal Procedure Arts. 410 and 416.

9. Defendant Robert Fitzmorris, residing at St. Tammany Court House, Covington, Louisiana, is Clerk of Court of the 22nd Judicial District of the State of Louisiana. As Clerk of Court, defendant Fitzmorris is an ex officio member of the Jury Commission of St. Tammany Parish in accordance with Louisiana Code of Criminal Procedure Art. 404, and is charged under Louisiana Code of Criminal Procedure Art. 417 with preparing a process verbal of the selection of the general venire and of the drawing of the grand jury venire and petit jury venire.

10. All defendants named in paragraphs (6)-(9) hereof are sued in their official capacities and as representatives of all other administrators, officers and agents charged with executing and administering the provisions of the Louisiana Constitution and statutes that deny to women and men equal rights and responsibilities with respect to jury service.

VI. Statement of the Claim

11. The named female plaintiffs, women residing in St. Tammany Parish, are eligible for jury service pursuant to Louisiana Code of Criminal Procedure Art. 401. As a result of the exclusionary prescriptions of Louisiana Code of Criminal Procedure Art. 402, Louisiana R.S. 13:3055, and Section 41 of Art. 7 of the Louisiana Constitution, these plaintiffs have never served on a jury nor have they ever been subpoenaed to appear for jury service, nor are they afforded the opportunity to litigate before juries on which members of their class are fairly represented.

12. The named male plaintiffs, men residing in St. Tammany Parish, are eligible for jury service pursuant to Louisiana Code of Criminal Procedure Art. 401. Plaintiffs Healy and Walz have been subpoenaed to appear for jury service and have served on a jury on one or more occasions. As a result of the exclusionary prescriptions of Louisiana Code of Criminal Procedure Art. 402, Louisiana R.S. 13:3055, and Section 41 of Art. 7 of the Louisiana Constitution, these plaintiffs are subject to a disproportionate jury service obligation.

13. The 1970 Census of Population, Louisiana General Population Characteristics, published by the United States Department of Commerce, Bureau of the Census, shows the total population of St. Tammany Parish over the age of 21 as 34, 823; the male population of the Parish as 16,674 (approximately 48%) and the female population as 18,149 (approximately 52%).

14. Although the named female plaintiffs and the members of their class are fully qualified to serve on grand

and petit juries in St. Tammany Parish, they are excluded by State law from such service unless and until they file with the Clerk of the Court of the Parish a written declaration of their desire to serve as jurors.

15. The named male plaintiffs and the members of their class are eligible to serve on grand and petit juries in St. Tammany Parish and are required by State law to serve on such juries without regard to their desire to serve as jurors. These plaintiffs are neither required nor permitted to file with the Clerk of the Court of the Parish a written declaration of their desire to serve or not to serve as jurors.

16. The exclusion of women from jury service mandated by Louisiana law arbitrarily and systematically deprives the named female plaintiffs and the class they represent of full and equal enjoyment and exercise of their rights and responsibilities as citizens of the State of Louisiana and of the United States in violation of the sixth amendment, and the due process, equal protection, and privileges and immunities clauses of the fourteenth amendment to the Constitution of the United States.

17. The exclusion of women from jury service mandated by Louisiana law constitutes an arbitrary, irrational and over broad classification, discriminating against the named male plaintiffs and the class they represent in violation of the equal protection clause of the fourteenth amendment to the Constitution of the United States.

18. The acts of the defendants in enforcing Louisiana Code of Criminal Procedure Art. 402, Louisiana R.S. 13:3055, and Section 41 of Art. 7 of the Louisiana Constitution, and specifically the refusal of the defendant Jury Commissioners to include the female plaintiffs and the members of their class in the general venire and grand and petit jury venires of St. Tammany Parish in the same manner in which the male plaintiffs and the members of their class are included, constitute unlawful discrimination on the ground of sex in violation of rights secured

equally to both classes of plaintiffs by the fourteenth amendment to the Constitution of the United States,

19. All acts alleged in this complaint to have been done or omitted by defendants were done or omitted under color of law of the State of Louisiana and under color of defendants' respective offices as officers and agents of the State of Louisiana.

20. The named plaintiffs and all those similarly situated and affected, on whose behalf this action is brought, are suffering and will continue to suffer irreparable injury and deprivation of rights secured to them by the fourteenth amendment to the United States Constitution by reason of the acts herein complained of; they have no adequate remedy to redress the wrongs and unlawful acts herein complained of other than this action for a declaration of rights and an injunction.

VII. Prayer for Relief

21. WHEREFORE, Plaintiffs respectfully pray, on behalf of themselves and all other persons similarly situated, that this court:

(a) Convene a three-judge court pursuant to 28 U.S.C. §§2281 and 2284 to determine this controversy;

(b) Certify that this action is maintainable as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;

(c) Declare that Louisiana Code of Criminal Procedure Art. 402, Louisiana R.S. 13:3055, and Section 41 of Art. 7 of the Louisiana Constitution are unconstitutional facially and as applied to plaintiffs and the classes they represent, to the extent that these provisions mandate dissimilar treatment of similarly situated men and women;

(d) Issue a preliminary and final injunction restraining defendants from enforcing Louisiana Code of Criminal Procedure Art. 402, Louisiana R.S. 13:3055, and Section 41 of

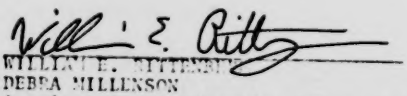
Art. 7 of the Louisiana Constitution;

(e) Issue a preliminary and final injunction requiring defendant Jury Commissioners to accord to plaintiff and the classes they represent equal rights and responsibilities with respect to selection for the general venire, grand jury venires and petit jury venires, and the grand juries and petit juries drawn therefrom;

(f) Assess reasonable costs and attorneys fees;

(g) Grant such other and further relief as this court deems just and proper.

RESPECTFULLY SUBMITTED:



WILLIAM E. RITTENDATE
DEBRA MILLENSON
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522-0617

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Attorneys for Plaintiffs

TELEPHONE 522-0617

WILLIAM E. RITTENBERG
ATTORNEY AT LAW
608 COMMON STREET
NEW ORLEANS, LA. 70130

March 16, 1973

MAR 16 9 11 AM '73
BENJAMIN W. REISCH
CLERK

Clerk of Court
United States District Court
Eastern District of Louisiana
400 Royal Street
New Orleans, Louisiana

73-688
SECTION C

Re: Healy, et al. v. Hon. Edwin Edwards, et. al.

Dear Sir:

The captioned suit, filed today, involves a challenge to the constitutionality of a state statute and must therefore be heard by a three-judge court as required by 28 U.S.C. 2281, 2282 and 2284. I would appreciate you immediately taking whatever steps are necessary to notify the Court so that it may request the appointment of such a panel.

Sincerely,

William E. Rittenberg

WER/dd

FEE
PROCESS
X CHARGE
INDEX
ORDER
HEARING
DOCUMENT NO. 2

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

JOHN R. BROWN
CHIEF JUDGE
HOUSTON, TEXAS 77002

March 29, 1973

Mr. Benjamin W. Reisch, Clerk
Eastern District of Louisiana
400 Royal Street
New Orleans, Louisiana 70130

No. 73-688, Healy, et al v. Hon. Edwin Edwards, et al

My dear Mr. Reisch:

In response to the request of Judge Rubin, I have constituted the Court in accordance with the * enclosed designation order which I request you to file. * I also enclose the pleadings, in reference to this matter, which were sent to me by Judge Rubin.

Copies of this order are being sent to the Judges.

Sincerely yours,

JRB

* Enclosures

cc: Hon. John Minor Wisdom
Hon. Alvin B. Rubin
Hon. R. Blake West

MAR 2 12 21 PM '73
BENJAMIN ... CLERK

11

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, ET AL, Plaintiffs, vs. HON. EDWIN EDWARDS, ET AL, Defendants.	NO. 73-688 C (1) Requesting Judge: Honorable Alvin B. Rubin Eastern District of Louisiana (2) District Judge: Honorable R. Blake West Eastern District of Louisiana (3) Circuit Judge: Honorable John Minor Wisdom (4) Date of Order: March 29, 1973

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay[illegible]

APR 4 1973 (1)

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CHA...
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ORD...
HEARING
DOCUMENT NO. 7

awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-Judge panel either preliminarily or on the trial of the merits, or otherwise, as that Court thinks appropriate.

JOHN R. BROWN
Chief Judge
Fifth Circuit

U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
FILED APR 25 1973
BENJAMIN W. REISCH
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

MARSHA B. HEALY, ET AL.	*	CIVIL ACTION
VERSUS	*	NO. 73-688
HON. EDWIN EDWARDS, GOVERNOR STATE OF LOUISIANA, ETAL.	*	DIVISION "C"

* * * * * * * * * * * *

MOTION TO DISMISS

Pursuant to Rule 12 b (6) of the Federal Rules of Civil Procedure, defendants, through the undersigned counsel, move to dismiss the complaint for the following reason:

I.

Plaintiffs' complaint fails to set forth a claim upon which relief can be granted.

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL

WARREN E. MOULEDOUX
FIRST ASSISTANT ATTORNEY GENERAL

Dale C. Wilks
DALE C. WILKS
SPECIAL COUNSEL

Louis A. Gerdes, Jr.
LOUIS A. GERDES, JR.
SPECIAL COUNSEL

234 Loyola Ave.
7th Floor
New Orleans, Louisiana 70112

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this 25th day of April, 1973.

Dale C. Wilks

Charles Neale Feild

Frank J. Neale Feild

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Marsha B. Healy, et al.	*	CIVIL ACTION
versus	*	NO. 73-689
Hon. Edwin Edwards, Governor	*	SECTION "C"
State of Louisiana, et al.	*	

NOTICE

TO: William Rittenberg, Esq.
606 Common Street
New Orleans, Louisiana 70112

Please take notice that the undersigned will bring the above motion on for hearing before this Court at Division "C", United States District Court, 400 Royal Street, City of New Orleans, on the 9th day of May, 1973, at 10:00 A.M. or as soon thereafter as counsel can be heard.

Dale C. Wilks

DALE C. WILKS
Special Counsel
State of Louisiana

Louis A Gerdes, Jr.

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ AND JOHN J. HEALY	:	CIVIL ACTION NO. 73-688
VERSUS	:	SECTION "C"
HON. EDWIN EDWARDS, GOVERNOR OF LOUISIANA, HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, JUDGES OF THE 22nd JUDICIAL DISTRICT COURT, DELOS FUSSELL, A. B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM; ALL DEFENDANTS ARE SUED BOTH IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES	:	

: : : : : :

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

The thrust of plaintiffs' complaint alleges that Article 402 of the Louisiana Code of Criminal Procedure, Louisiana Revised Statute 13:3055, and Section 41 of Article 7 of the Louisiana Constitution of 1921, which provisions exempt women from jury service unless they file with the Clerk of Court a written declaration indicating their desire to be subject to such service, arbitrarily and systematically deprives both female and male plaintiffs and the class they represent of rights secured under the Sixth Amendment and the due process, equal protection and privileges and immunities clauses of the Fourteenth Amendment to the United States Constitution.

Defendants urge, as grounds for their motion to dismiss that:

(1) Both female and male plaintiffs lack standing to allege a deprivation of rights secured by the Sixth Amendment to the United States Constitution;

(2) Male plaintiffs lack standing to allege a deprivation of rights secured by the due process, equal protection and privileges and immunities clause of the Fourteenth Amendment to the United States Constitution;

(3) The exemption from jury service which is granted to women under Article 402 of the Louisiana Code of Criminal Procedure, R.S. 13:3055 and Section 41 of Article 7 of the Louisiana Constitution of 1921, is based upon a reasonable classification and its exercise rests on a rational foundation and thus, is constitutional.

I. FEMALE AND MALE PLAINTIFFS LACK STANDING TO ALLEGE DEPRIVATION OF RIGHTS SECURED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In Commonwealth of Massachusetts v. Mellon, 262 U. S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1922), the United States Supreme Court set forth the test for determining whether a party has the right, i.e. "standing", to question the constitutionality of a statute as follows:

"It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief.

This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation, upon rights properly falling under judicial cognizance, or a remedy is not to be had here.

...We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." (Emphasis ours). Massachusetts v. Mellon, 262 U. S. at page 488.

This principle was given early application and has been recurringly enforced in the courts' refusal to entertain cases which disclosed a want of a truly adversary contest. See also, Poe v. Ullman, 367 U. S. 497, 81 S. Ct. 1752 (1961); United States V. Raines, 362 U. S. 17, 80 S. Ct. 519 (1960); and Sierra Club v. Morton, 92 S. Ct. 1361 and Kaufman v. Dreyfus Fund, Inc., 14 F.R. Serv. 2d 401 (CA 3d 1970) holding that to be a member of the purported class, a named plaintiff must be aggrieved or immediately threatened with specific injury by virtue of defendants' actions which are challenged, and injury to the representative is a sine qua non of representation.

On July 27, 1972, in the case of Galliot v. U. S. Department of H.E.W., No. 71-2805 Summary Calendar, C.A. 5th, slip

opinion (1972), pp 2-3, the Fifth Circuit stated:

> "Federal courts traditionally have declined to decide questions of potentially constitutional significance - or, for that matter, questions of any other sort - unless they arise from a 'case or controversy' within the meaning of Article III of the United States Constitution. A 'controversy' in this sense involves considerably more than mere abstract philosophical disagreement with the wisdom, propriety or desirability of specific governmental activities, necessitating a judicial opinion 'advising what the law would be upon a hypothetical state of facts.' Aetna Life Insurance Co. v. Haworth, 1937, 300 U. S. 227, 241, 57 S.Ct. 461,_____, 81 L. Ed. 617, 621; Nashville, Chattanooga & St. Louis Railway v. Wallace, 1933, 288 U. S. 249, 262, 52 S.Ct. 345,____, 77 L.Ed. 730, 735; Byers v. Byer, 5 Cir., 1958, 254 F. 2d. 205, 208. A a corollay proposition, a party seeking relief must establish his interest in the outcome of the litigation by demonstrating actual or immediately threatened interference with his legal rights, rather than some speculative future adversity that may never materialize. Poe v. Ullman, 1961, 367 U. S. 497, 504, 81 S.Ct. 1952,_____, 6 L.Ed.2d 989, 996; International Longshoremen's and Warehousemen's Union v. Boyd, 1954, 347 U. S. 222, 74 S.Ct. 447, 98 L.Ed. 650." Gaillot v. U. S. Dept. of HEW, No. 71-2805 Summary Calendar, C.A. 5th, slip opinion, pp. 2-3.

In Donohoe v. Duling, decided by the 4th Circuit on August 1, 1972, 41 Law Week 2067, the court following the Supreme Court's decision in Tatum v. Laird, 40 Law Week 4850, held that it was essential for the plaintiff to show direct injury to himself and not sufficient to base his right to sue on injury to another.

In Mottolla v. Nixon, 41 Law Week 2068, decided by the 9th Circuit on July 13, 1972, the Court, citing the Supreme Court decision in Sierra Club v. Morton, 92 S.Ct. 1361 (1972) held that plaintiffs who failed to allege injury in fact lacked standing and that the mere possibility of injury was not sufficient for standing.

In the instant case, the plaintiffs, both male and female, have failed to allege or show that they have sustained or are immediately in danger of sustaining some direct injury or deprivation of their right to trial by an impartial jury as guaranteed by the Sixth Amendment. None of the plaintiffs have been tried by a Louisiana jury, nor are any of them presently threatened with criminal prosecution which might result in their being tried by a Louisiana jury.

In absence of any allegation or showing of direct injury or threat of injury, defendants maintain that plaintiffs do not possess the requisite standing to challenge Article 402 of the Louisiana Code of Criminal Procedure, Louisiana Revised Statute 13:3055 and Section 41 of Article 7 of the Louisiana Constitution of 1921 on the grounds that these provisions deprive them of rights secured by the Sixth Amendment to the United States Constitution. Thus, having failed to present a "justiciable controversy", this court lacks jurisdiction to hear and decide the issues pertaining to the alleged deprivation of plaintiffs' Sixth Amendment rights.

II. MALE PLAINTIFFS LACK STANDING TO ALLEGE DEPRIVATION OF RIGHTS SECURED BY THE DUE PROCESS, EQUAL PROTECTION AND PRIVILEGES AND IMMUNITIES CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In Leighton v. Goodman, 311 F. Supp. 1181 (1970), U. S. District Court, S. D. New York, suit was brought by a prospective male juror to declare unconstitutional a New York statute which grants exemption from jury duty to women. In dismissing the suit on defendant's motion pursuant to Rule 12 (b) (1) and (6), the court addressed itself to the issue of "plaintiff's "standing" and stated:

> "At the outset we have serious question as to whether plaintiff's action reveals sufficient danger of injury or harm to him to give him standing to attack the constitutionality of § 599 (7). See Gruenwald v. Gardner, 390 F. 2d 591 (2nd Cir) cert. denied, 393 U. S. 982, 89 S. Ct.456, 21 L.Ed. 2d 445 (1968). There is no indication that even if women were not entitled to statutory exemption plaintiff would not be required to serve. The most that can be said (although it is not asserted by plaintiff) is that if women were obligated to serve without exemption, fewer male jurors might be needed and plaintiff might then be among those not called, which at best presents an extremely thin basis for giving him the right to attack § 599 (7)."

Further, in the recent decision of Alexander v. Louisiana, 405 U. S. 625 (1972), the United States Supreme Court specifically addressed itself to the equal protection argument brought by a male challenging Article 402 of the Louisiana Code of Criminal Procedure and held accordingly:

> "Petitioner also challenges the Louisiana statutory exemption of women who do not volunteer for grand jury service. Article 402, La. Code of Criminal Procedure. This claim is novel in this court and, when urged by a male, finds no support in our past cases. The strong constitutional and statutory

> "policy against racial discrimination has permitted Negro defendants in criminal cases to challenge the systematic exclusion of Negroes from grand juries that indicted them. Also, those groups arbitrarily excluded from grand or petit jury service are themselves afforded an appropriate remedy. Cf. Carter v. Jury Commission, 396 U. S. 320 (1970). But there is nothing in past adjudications suggesting that petitioner himself has been denied equal protection by the alleged exclusion of women from grand jury service. ..." (Emphasis ours)

As noted by Judge Dawkins in U. S. ex rel Doris V. Henderson, 330 F. Supp. 797, W.D. of La. (1971):

> "The intentional exclusion by a State of qualified persons from a grand or petit jury because of race or national origin has been held to be violative of equal protection of the laws. Patton v. Mississippi, 332 U. S. 463, 68 S. Ct. 184, 92 L.Ed. 76 (1947); Hernandez v. Texas, 347 U. S. 475, 74 S.Ct. 667, 98 L. Ed. 866 (1954). The Supreme Court has not applied the equal protection clause to prohibit exclusion or inclusion on a jury for any reason other than race or national origin. See Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 97 L.Ed. 469 (1953); Fay v. New York, 332 U. S. 261, 67 S. Ct. 1613, 91 L.Ed. 2043 (1947); Hoyt v. Florida, 368 U. S. 57, 82 S. Ct. 159, 7 L.Ed. 2d 118 (1961). It is well settled that the Constitution does not require proportional representation. Fay v. New York, supra; Hoyt v. Florida, supra; Akins v. Texas, 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692 (1945). (Emphasis ours).

In view of the above cited cases, defendants assert that the male plaintiffs have not alleged or shown a direct injury or threat of sustaining a direct injury and thus, have no "standing" to allege deprivation of rights secured by the due process, equal protection and privileges and immunities clauses of the Fourteenth Amendment to the United States Constitution.

III. THE EXEMPTION FROM JURY SERVICE WHICH IS GRANTED TO WOMEN UNDER ARTICLE 402 OF THE LOUISIANA CODE OF CRIMINAL PROCEDURE, R.S. 13:3055 AND SECTION 41 OF ARTICLE 7 OF THE LOUISIANA CONSTITUTION OF 1921, IS BASED UPON A REASONABLE CLASSIFICATION AND ITS EXERCISE RESTS ON A RATIONAL FOUNDATION, AND THEREFORE, IS CONSTITUTIONAL.

One of the basic principles of constitutional law with regard to class legislation is that classifications and restrictions which serve to penalize or restrict the exercise of a constitutionally protected right are to be scrutinized closely and must be shown to promote a "compelling governmental interest" in order to withstand attack under the Fourteenth Amendment. See, Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L.Ed. 2d 600 (1968); Skinner v. Oklahoma, 316 U. S. 535, 62 S. Ct. 1110, 86 L.Ed. 1655 (1942); Bates v. Little Rock, 361 U. S. 516, 80 S.Ct. 412, 4 L.Ed. 2d 480 (1960); Sherbert v. Verner, 374 U. S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963); Cipriano v. City of Houma, 395 U. S. 701, 89 S. Ct. 1897, 23 L.Ed. 2d 647 (1969).

Therefore, discrimination by sex is not patently unlawful or unconstitutional. See, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937) (Statute providing minimum wage for women but not men); Rodice v. New York, 264 U.S. 292, 44 S.Ct. 325, 68 L.Ed. 690 (1924) (special statute limiting hours of night work of women in cities with a particular population); Goesaert v. Cleary, 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948) (proscribing use of women as licensed bartenders); Hoyt v. Florida, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed. 2d 118 (1961) (jury duty voluntary for women but compulsory for men); Miskunas v. Union Carbide Corp., (7th Cir. 1968) 399 F.2d 847, cert. denied 393 U.S. 1066, 89 S.Ct.

718, 21 L.Ed. 2d 709(c), (denial to wife, but not husband of right to recover for loss of consortium); Gruenwald v. Gardner, (2nd Cir. 1968) 390 F.2d 591, cert. denied 393 U.S. 982, 89 S.Ct. 456, 21 L.Ed. 2d 445 (women given more favorable treatment than men in Social Security benefits); U.S. v. St. Clair, (D.C. N.Y. 1968) 291 F. Supp. 122 (men subject, women not, under Selective Service Act); Clarke v. Redker, (D. C. Iowa 1966) 259 F. Supp. 117, (fixing wife's residence by husband's but not the reverse); Heaton v. Bristol, (Tex. Cir. App. 1958) 317 S.W. 2d 86, cert. denied 359 U.S. 230, 79 S.Ct. 802, 3 L.Ed. 2d 765 and Allred v.Heaton , (Tex. Cir. Appl 1960), 336 S.W. 2d 251, cert. denied 364 U.S. 517, 81 S.Ct. 293, 5 L.Ed. 2d 265 (both involving denial of right of women to attend all-male state-supported college).

The rational basis and compelling state interest for exempting women from jury duty was passed on and upheld by the United States Supreme Court in Hoyt v. Florida, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed. 2d 118 (1961). In that case the constitutionality of a Florida statute almost identical to the provisions of La. C. Cr. Proc. Article 402 and Article 7, Section 41 of the Louisiana Constitution of 1921 was at issue. The Court upheld the constitutionality of the Florida statute stating:

> ". . . We cannot say that it is constitutionally impermissible for a state, acting in pursuit of the general welfare to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." Hoyt, supra, at 368 U.S. 62, 82 S.Ct. 162-163

> "In the selection of jurors Florida has differentiated between men and women in two respects. It has given women an absolute exemption from jury duty based solely on their sex, no similar exemption obtaining as to men. And it has provided for its effectuation in a manner less onerous than that governing exemptions exercisable by men: women are not to be put on the jury list unless they have voluntarily registered for service: men, on the other hand, even if entitled to an exemption, are to be included on the list unless they have filed a written claim of exemption as provided by law. Fla. Stat., 1959, Sec. 40. 10, F.S.A.
>
> In neither respect can we conclude that Florida's statute is not based on some reasonable classification, and that, it is thus infected with unconstitutionality. Despite the enlightened emancipation of women from the restrictions of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life."
> Hoyt, supra, at 368 U.S. 61, 82 S.Ct. 162.

There has been no contrary jurispurdence from the United States Supreme Court since the Hoyt decision, although the Court has had the opportunity to overrule the case at least once in the past year. In Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed. 2d 536 (1972) the question of the constitutionality of La. C. Cr. Proc. Article 402 was expressly avoided by the United States Supreme Court, the majority preferring to base the decision (reversing a conviction) on other grounds. To the contrary, in Leighton v. Goodman, 311 F.Supp. 1181 (1970) and United States v. Coci, 401 F.2d 664, 671 (2nd Cir. 1968), cert. denied, 394 U.S. 917, 89 S.Ct. 1180, 22 L.Ed. 2d 450 (1969), the constitutionality of the New York statute permitting women to claim exemption has been sustained, both

courts citing Hoyt v. Florida, supra.

The Louisiana Supreme Court, since the decision in Hoyt, has held in numerous cases, that the exemption provided to women by La. C. Cr. Proc. Art. 402 does not violate the due process provisions of the United States Constitution. See, State v. Enloe, No. 52,424 decided March 26, 1973; State v. J. C. Curry, 262 La. 280, 263 So.2d 36 (1972); State v. Daniels, 262 La. 475, 263 So.2d 859 (1972); State v. Reese, 250 La. 151, 194 So.2d 729, cert. denied, 389 U.S. 996, 88 S.Ct. 485, 19 L.Ed. 2d 495; State v. Comeaux, 252 La. 481, 211 So.2d 620 (1968); State v. Pratt, 255 La. 919, 233 So.2d 883 (1970); State v. Alexander, 255 La. 941, 233 So.2d 891 (1970); State v. Sinclair, 258 La. 84, 245 So.2d 365 (1971); State v. Millsap, 258 La. 883, 248 So.2d 324 (1971); and State v. Amphy, 259 La. 161, 249 So.2d 560 (1971).

Surely, we all recognize that during the past century women's rights have steadily increased to a point where, in most respects, they enjoy the same legal status as male members of our essentially industrial society. Much of this drive toward women's emancipation has resulted from feminists' organized efforts. The time may very well be ripe for amendment of La. C. Cr. Proc. Article 402, R.S. 13:3055 and Section 41 of Article 7 of the Louisiana Constitution of 1921, to remove the exemption of which plaintiffs complain. But the constitutionality of that statute does not turn on whether the state legislature would be well advised to amend it, or even upon the existence of some discrimination. It turns upon whether the classification based upon sex constitutes such an individous discrimination that it is patently arbitrary and utterly

lacking in any rational justification. If any reasonable basis exists for the alleged statutory discrimination, it must be upheld. See, McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1960); Flemming v. Nestor, 363 U.S. 603, 611, 80 S.Ct. 1367, 4 L.Ed. 563 (1955). The court does not "sit as a superlegislature . . .", Salsburg v. Maryland, 346 U.S. 545, 74 S.Ct. 280, 98 L.Ed. 281 (1953).

Granted, that some women pursue business careers, the great majority constitute the heart of the home, where they are busily engaged in the 24-hour day task of producing and rearing children, providing a home for the entire family, and performing the daily household work, all of which demands their full energies. Although some women now question this arrangement, the state legislature has permitted the exemption in order not to risk disruption of this basic family unit. Its action, defendants assert, is far from arbitrary and unreasonable.

SUMMARY

In conclusion, the defendants urge, in view of the above cited cases and authorities, that this court sustain their Motion to Dismiss on the grounds that plaintiffs' complaint fails to set forth a claim upon which relief can be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

MARSHA B. HEALY, ET AL.	*	CIVIL ACTION
VERSUS	*	NO. 73-688
HON. EDWIN EDWARDS, GOVERNOR STATE OF LOUISIANA, ET AL.	*	SECTION "C"

* * * * * * * * * * * *

ORDER

IT IS HEREBY ORDERED that pursuant to Rule 12 b (6) of the Federal Rules of Civil Procedure, the above captioned complaint be dismissed with prejudice, taxing costs against the plaintiffs.

New Orleans, Louisiana, this _____day of _____, 1973.

_____

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY, on behalf of themselves and others similarly situated,	)	
Plaintiffs,	)	
SHIRLEY ANN ROBINSON and JENNY LEE SMITH BAGGETT, on behalf of themselves and others similarly situated,	)	CIVIL ACTION
Applicants for Intervention,	)	NO. 73-688
versus	)	SECTION "C"
EDWIN EDWARDS, Governor of Louisiana; THOMAS W. TANNER, WALLACE A. EDWARDS and HILLARY J. CRAIN, Judges of the Twenty Second Judicial District; DELOS FUSSELL, A. B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM, Members of the Jury Commission of St. Tammany Parish; JOHN WOOD, MARVIN WILLIAMS, HAROLD FOIL and DEWAINE SEAL, Members of the Jury Commission of Washington Parish,	)	
Defendants.	)	

MOTION TO INTERVENE AND TO JOIN PARTIES DEFENDANT

Applicants for intervention Shirley Ann Robinson and Jenny Lee Smith Baggett move for leave to intervene as parties plaintiff in this action pursuant to the terms of Rule 24(b) of the Federal Rules of Civil Procedure. Grounds in support of this motion are stated in the accompanying memorandum.

Pursuant to Rule 24(c), a proposed Amended Complaint in Intervention, embodying the claims of the applicants for intervention, as well as the claims of the existing plaintiffs, is submitted herewith.

Pursuant to Rules 15(a), 20(a) and 21 of the Federal Rules, plaintiffs move to amend the complaint and to join additional parties defendant by substituting the accompanying Amended Complaint in Intervention for the original complaint. The grounds for this request are stated in the accompanying memorandum.

Respectfully submitted,

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524-2237

SYLVIA ROBERTS
Post Office Box 3081
Baton Rouge, Louisiana 70821

By: George M. Strickler, Jr.
Attorneys for Plaintiffs and
Applicants for Intervention

Dated: May 30, 1973

NOTICE OF MOTION

Please take notice that plaintiffs' and applicants for interventions' Motion to Intervene and to Join Parties Defendant will be brought on for hearing in Section "C" of the United States District Court for the Eastern District of Louisiana, 400 Royal Street, New Orleans, Louisiana, on June 13, 1973, at ~~10:00~~ 9:30 a. m. or as soon thereafter as counsel may be heard.

GEORGE M. STRICKLER, JR.
Attorney for Plaintiff and Applicants
for Intervention

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion to Intervene and to Join Parites Defendant, together with accompanying memorandum and proposed Amended Complaint and Complaint in Intervention, was mailed, postage prepaid, first class, this 30th day of May, 1973, to:

Dale C. Wilks, Esq.
Louisiana Attorney General
234 Loyola Avenue
New Orleans, Louisiana 70112

GEORGE M. STRICKLER, JR.
Attorney for Plaintiffs and
Applicants for Intervention

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

MARSHA B. HEALY, ET AL.	:	CIVIL ACTION
v.	:	NO. 73-688
HON. EDWIN EDWARDS, ET AL.	:	SECTION "C"

CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiffs, through the undersigned counsel, move for summary judgment for the following reason:

This case presents no genuine issue as to any material fact; plaintiffs are entitled to judgment for the relief requested in the complaint as a matter of law.

George M. Strickler
Attorney for Plaintiffs
1110 Royal Street
New Orleans, Louisiana 70116

NOTICE OF MOTION

Please take notice that plaintiffs' Cross-Motion for Summary Judgment will be brought on for Hearing in Section "C" of the United States District Court for the Eastern District of Louisiana, 400 Royal Street, New Orleans, Louisiana, on June 13, 1973, at ~~10:00~~ 9:00 a. m. or as soon thereafter as counsel may be heard.

GEORGE M. STRICKLER, JR.
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Cross-Motion for Summary Judgment and Memorandum in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Cross Motion for Summary Judgment was mailed, postage prepaid, first class, this 30th day of May, 1973, to:

Dale C. Wilks, Esq.
Louisiana Attorney General
234 Loyola Avenue
New Orleans, Louisiana 70112

GEORGE M. STRICKLER, JR.
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

MARSHA B. HEALY, ET AL.,	:	CIVIL ACTION
v.	:	NO. 73-688
HON. EDWIN EDWARDS, ET AL.	:	SECTION "C"

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

I. Preliminary Statement

Plaintiffs, individually and on behalf of all persons similarly situated, seek to have this court declare unconstitutional and enjoin the enforcement of Article 402 of the Louisiana Code of Criminal Procedure, Louisiana R.S. 13:3055, and Section 41 of Article 7 of the Louisiana Constitution, provisions that exclude from jury service all women who do not file with the Clerk of the Court a written declaration of their desire to serve as jurors. These provisions are challenged on the ground that they deny to women and men the equal protection of the laws safeguarded to all persons, males and females alike, by the fourteenth amendment to the United States Constitution.

Consonant with the dual aspect of jury service in our constitutional system -- it is at the same time a fundamental right and a fundamental responsibility of citizenship -- the named plaintiffs represent two classes: (1) the Female Class, persons whose right to serve on juries is conditioned on a registration requirement not imposed on similarly situated males, whose opportunity to litigate before juries on which members of their sex are represented is drastically curtailed, and whose exclusion from responsibility to serve on juries sets them apart as subordinate citizens; (2) the Male Class, persons subject to a disproportionate obligation to serve on juries because similarly situated females are excluded from service.

II. Both Female and Male Plaintiffs Have Standing to Bring this Action.

In urging lack of standing as grounds for their motion to dismiss, defendants totally misconceive the gravamen of the complaint. Although other constitutional provisions are implicated, it is plaintiffs' principal position that the Louisiana jury selection provisions challenged here have exposed and continue to expose them to dissimilar treatment solely on the basis of their sex; accordingly, these provisions deny to them the equal protection of the laws safeguarded to all persons, males and females alike, by the fourteenth amendment to the United States Constitution.*/ Frontiero v.

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*/ Defendants apparently concede female plaintiffs' standing to allege a deprivation of rights secured by the equal protection clause. The motion to dismiss challenges only the standing of the male plaintiffs on this ground.

Richardson, 41 U.S. Law Week 4609 (May 14, 1973); Reed v. Reed, 404 U.S. 71 (1971); cf. Stanley v. Illinois, 405 U.S. 645 (1972).

The function of the standing requirement in a civil action challenging the constitutionality of federal or state legislation has been succinctly stated by the Supreme Court: it is "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962); see Flast v. Cohen, 392 U.S. 83, 99 (1968). The test determinative of standing is twofold: (1) plaintiff must allege that the challenged action has caused or will cause him "injury in fact, economic or otherwise," Data Processing Service v. Camp, 397 U.S. 150, 152 (1969); (2) the interest sought to be protected by the complainant must be "arguably within the zone of interests to be protected or regulated" by the statutory or constitutional guarantee in question. Data Processing Service v. Camp, supra, 397 U.S. at 153. See Whitney v. Wilson City Board of Education, 427 F.2d 179, 180 (4th Cir. 1970).

It is beyond debate that the sex discrimination claims asserted by plaintiffs in this action fall within the "zone of interests" protected by the fourteenth amendment's equal protection guarantee. Frontiero v. Richardson, supra; Reed v. Reed, supra ("dissimilar treatment for men and women who are similarly situated" violates equal protection).

Equally clear is plaintiffs satisfaction of the requirement that they have a sufficient personal interest in the issues raised to import the concrete adverseness required for an Article III "case or controversy"; the challenged legislation has or will cause them "injury in fact."

A. Women as potential jurors.

The Louisiana jury selection statutes presume two classes of adult citizens: Those responsible for full participation in community life; those whose participation in community life is subordinate to their place at home. All men, regardless of their individual situation, rank in the former class; all women, married or single, mothers or childless, rank in the latter class. The "injury in fact" accomplished by this rigid sex-role stereotyping is apparent: women are injured by the inferior citizenship status to which the jury selection provisions assign them.

Women's access to an attribute of adult citizenship is impeded by the peremptory exclusion of their names from jury lists, and the requirement that they specially register to have their names placed on those lists. A man's chances of service on a Louisiana jury are not affected by his ignorance or misinformation about his right and obligation as a citizen to serve. A woman will never be afforded that right unless she first learns of it and how to exercise it. Most significantly, since jury service, more than voting, is an obligation as well as a right of citizenship, the total

exclusion of women from this responsibility invidiously relegates them "to inferior legal status without regard to [their] actual capabilities." Frontiero v. Richardson, supra, 41 U.S. Law Week at 4612.*/

A plaintiff satisfying the "injury in fact" requirement may assert considerations of general public interest in seeking equitable relief against unlawful action. See Flast v. Cohen, supra; Baker v. Carr, supra. The right and obligation of female citizens to participate in the administration of justice on the same basis as male citizens is appropriately regarded as an essential accoutrement of the constitutional right to an impartial jury drawn from all segments of the community. Carter v. Jury Commission, 396 U.S. 320, 330 (1969); cf. Griswold v. Connecticut, 381 U.S. 479 (1965). Thus the right flows not simply to persons as potential jurors, but also to litigants and to society as a whole, helping to insure that the judicial system functions to provide the fair trials that representative juries promote. Carter v. Jury Commission, supra; Peters v. Kiff, 407 U.S. 493 (1972); Alexander v. Louisiana, 405 U.S. 625, 6 -- (1971)

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*/ For explicit recognition that jury service is both a "duty" and a "right, benefit or privilege," see Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946); Carter v. Jury Commission, 396 U.S. 320, 330 (1969); Broadway v. Culpepper, 439 F.2d 1253, 1258 (5th Cir. 1971) (jury service characterized as a crucial citizenship responsibility).

(concurring opinion). As the community will benefit from the assertion and vindication of plaintiffs' claim, the argument for according them the opportunity to present their case on the merits is compelling, for they raise not only the full status as citizens they seek for themselves, but also a larger public interest.

B. Male plaintiffs.

The "injury in fact" and "zone of interest" requirements are plainly met with respect to the male plaintifts. While they have no wish to abdicate their right to be included automatically on jury rolls, they currently suffer the detriment of bearing more than their fair share of the responsibility which accompanies that right. Their chances of being called for jury duty are roughly twice as great as they would be if women were subject to service on an equal basis. This excessive burden injures them to the extent of work-time lost as a result of a call occasioned at least in part by exclusion of female names. Other options for time expenditure are also lost to them. Cf. De Kosenko v. Brandt, 63 Misc. 2d 895, 898, 313 N.Y.S. 2d 827, 830 (Sup.Ct. 1970) (If women prefer "cleaning and cooking, bridge and canasta, the beauty parlor and shopping" to jury service, as the court supposed, would not men prefer golf or poker or a day at the races?). */

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*/ Leighton v. Goodman, 311 F.Supp. 1181 (S.D.N.Y. 1970), is rather a slim reed for defendants' assault on male plaintiffs' standing. Although the court did express doubts as to plaintiff's standing in that action, it went on to decide the case on the merits, surely an inappropriate course if an Article III "case or controversy" did not exist.

Clear support for the standing of the male plaintiffs appears in the cases in which the draft was attacked on the bases of sex discrimination. Although the plaintiffs ultimately lost on the merits, their standing was unquestioned. United States v. St. Clair, 291 F.Supp. 122 (S.D.N.Y. 1968); United States v. Cook, 311 F.Supp. 618 (W.D. Pa. 1970); United States v. Dorris, 319 F.Supp. 1306 (W.D. Pa. 1970); United States v. Clinton, 310 F.Supp. 333 (E.D. La. 1970). The nature of the injury occasioned to the male litigants in the draft cases closely resembles the injury sustained here -- increased likelihood that they would be required to fulfill a societal responsibility because members of the other sex were exempt from imposition of that responsibility. In this case, as in the draft cases, the male plaintiffs have been subjected to double exposure and, like the draftees, they have felt the impact of that exposure. */

C. Women as litigants.

Without women as triers of fact, women litigants suffer a demonstrable "injury in fact." For "the two sexes are not fungible; a community made up exclusively of one

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*/ Defendants miss the mark in their reference to Alexander v. Louisiana, 405 U.S. 625 (1972). Here, male plaintiffs complain of an excess burden of jury service imposed upon them; they do not complain, as Alexander did, as a litigant who was not tried by a representative jury. Moreover, the passage from Alexander quoted by defendants did nothing more than leave open the question whether a male defendant could complain of the absence of women on his jury. The Court made it plain that it was unnecessary to reach that issue since the exclusion of blacks was sufficient reason to set aside Alexander's conviction. Further, the Court supplied, after its decision in Alexander, clear indication of how it would resolve the question when squarely presented. See Peters v. Kiff, 407 U.S. 493 (1972) (white defendant has standing to challenge exclusion of blacks).

is different from a community composed of both." Ballard v. United States, 329 U.S. 187, 193 (1946). A female personal injury plaintiff, for example, is likely to suffer a significant disadvantage from the absence of women on her jury. Empirical studies indicate that male-dominated juries, such as those which sit in Louisiana courts as a result of the challenged jury selection provisions, award greater damages to male than to female plaintiffs in civil cases, and are likely to give male defendants lighter sentences than female defendants in criminal cases. Nagel & Weitzman, Women as Litigants, 23 Hastings L.J. 171, 192-97 (1971). Thus, women litigants are exposed to a risk beyond that encountered by any litigant whose case is presented to an improperly constituted jury;*/ the exclusion of women from the jury rolls threatens harm peculiar to them as female litigants.

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*/ When a jury is improperly constituted, a litigant need now show that he was in some specific sense harmed by the infirmity, either for standing, or to prevail on the merits. Peters v. Kiff, 407 U.S. 493 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972); Ballard v. United States, 329 U.S. 197 (1945); Carmical v. Craven, 457 F.2d 582 (9th Cir. 1971); Ford v. White, 430 F.2d 564 (5th Cir. 1970); United States v. Butera, 420 F.2d 564 (1st Cir. 1970).

In sum, the right asserted by the female plaintiffs here is to full attribution to them of a characteristic of adult citizenship. Both as potential jurors and as litigants they are denied this full attribution by a qualification placed on the eligibility of women as jurors. This denial occasions "injury in fact." The right they claim is one in which they plainly have "a sufficient personal interest to impart the concrete adverseness required for an Article III case or controversy." Correspondingly, male plaintiffs fully satisfy standing requirements. They are disadvantaged by excess responsibility for jury service, with its attendant economic and time loss.

III. Dissimilar Treatment of Men and Women Solely on the Basis of Their Sex, as Mandated by Article 402 of the Louisiana Code of Criminal Procedure, Louisiana R.S. 13:3055, and Section 41 of Article 7 of the Louisiana Constitution, Denies to Plaintiffs the Equal Protection of the Laws Secured by the Fourteenth Amendment to the United States Constitution.

A. Female plaintiffs.

Female plaintiffs, as potential jurors and as present and potential litigants, claim that the Louisiana jury selection statutes, because they exempt women from jury service, deny plaintiffs and the class they represent the equal protection of the laws which the fourteenth amendment guarantees.*/ Plaintiffs' equal protection claims as both litigants and jurors are here treated together. Precedent

*/ See generally Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L.Rev. 675, 708-21 (1971) (review of federal and state decisions on right or duty of women to serve on juries).

affirms that the exclusion of "identifiable segments of the community from jury panels and from the juries ultimately drawn from these panels," Apodaca v. Oregon, 406 U.S. 404, 413 (1972), is a violation of equal protection both for litigants tried by discriminatorily selected juries, and for members of the group discriminated against. See Peters v. Kiff, 407 U.S. 493 (1972); Carter v. Jury Commission, 396 U.S. 320 (1969).

Many of the jury discrimination cases appear to blend "equal protection" and "due process" analysis without sharp distinction between the two. See, e.g., Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966); Mitchell v. Johnson, 250 F.Supp. 117 (M.D. Ala. 1966). Cf. Ford v. White, 430 F.2d 951 (5th Cir. 1970); McMannaman v. United States, 327 F.2d 21 (10th Cir. 1964); Padgett v. Buxton-Smith Mercantile Co., 283 F.2d 597 (10th Cir. 1960); Jewell v. Stebbins, 288 F.Supp. 600 (E.D. Ark. 1968). At base, the jury selection decisions appear to rest on a formulation tailored to the special concerns entailed in safeguarding lay participation in our system of justice in a manner reflective of the larger community served.

In effect, courts have applied to the exclusion from jury service of any "cognizable group or class of qualified citizens" the almost per se rule until recently reserved for discrimination against blacks. Grimes v. U.S., 391 F.2d 709 (5th Cir. 1968); see also McMannaman, supra. The excluded

group, to be considered "cognizable," must represent simply a "distinct class" in the community. In the seminal decision Hernandez v. Texas, 347 U.S. 475, 478 (1954), the Supreme Court stated: "Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time differences from the community norm may define other groups which need the same protection." Significantly, the Court pointed out in Hernandez that "the Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory' -- that is, based on differences between 'white' and Negro." Moreover, more recent decisions have not required that excluded groups demonstrate discrimination against them in the community; groups labelled "cognizable" include daily laborers, Labat v. Bennett, supra, U.S. v. Hunt, 265 F.Supp. 178 (W.D. Tex. 1967); members of any "economic class," Smith v. Yeager, 465 F.2d 272 (3rd Cir. 1972); and nonalien Spanish-Americans, U.S. v. Pentado, 463 F.2d 355 (5th Cir. 1972).

The Supreme Court, in Hoyt v. Florida, 368 U.S. 57 (1961), deviated from this "cognizable group" approach insofar as it applied to women. While recognizing that women constituted a "class in the community," and that the exemption from jury service which Florida afforded them might have operated as an "exclusionary device," Hoyt, supra at 61, the Court

nonetheless refused to invalidate that exemption. Instead of applying the almost per se rule employed in other jury discrimination cases, the Court examined the Hoyt "exclusionary device" in terms of "minimal rationality" equal protection analysis. It considered whether exemption of all women was "based on some reasonable classification," Hoyt, supra at 61, decided that it was, and therefore held the statute constitutional. The Hoyt Court, perhaps because of the deference it had shown in other contexts to legislative classifications based on sex, see, e.g., Goesaert v. Cleary, 335 U.S. 464 (1948), apparently viewed females as the only "distinct class" whose exclusion from jury service did not offend equal protection.

Recognizing that "the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both," Ballard v. United States, 329 U.S. 187, 193 (1946), a number of courts have characterized women as a "cognizable group" for purposes of jury discrimination equal protection analysis. See, e.g., Smith v. Yeager, supra; White v. Crook, 251 F.Supp. 401 (M.D. Ala. 1966). Ignoring or distinguishing Hoyt, these courts have held unconstitutional discrimination against women in jury selection just as they have invalidated jury selection discrimination against other groups. White v. Crook, supra; Ford v. White, 430 F.2d 951 (5th Cir. 1970). Most significantly, the Supreme Court itself has itself indicated its approval of this approach. See Peters v. Kiff, supra, 407 U.S. at 503-504 and n.12.

Hoyt no longer impedes or embarrasses federal courts confronted with jury selection statutes or practices that exclude or exempt women. For the Supreme Court has firmly rejected "minimal rationality" equal protection analysis for legislation that establishes sex-based classifications. Such classifications are now recognized to be "suspect" or "invidious." Frontiero v. Richardson, 41 U.S. Law Week 4609 (May 14, 1973)

1. The challenged Louisiana jury selection provisions work an invidious discrimination.

With some notable exceptions, until the current decade, the review standard for equal protection challenges to legislation according different treatment to women and men was deferential in the extreme. No line drawn between the sexes, however sharp, failed to survive constitutional assault. Gross generalizations concerning woman's place in man's world were routinely accepted as sufficient to justify discriminatory treatment. See, e.g., Goesaert v. Cleary, 335 U.S. 464 (1948); Hoyt v. Florida, 368 U.S. 57 (1961).

In 1971, a new direction was signalled by the Supreme Court. In Reed v. Reed, 404 U.S. 71, the Court invalidated an Idaho statute that gave a preference to men over women for appointment as estate administrators. Explictly repudiating one-eyed sex role thinking as a predicate for legislative distinctions, the Reed opinion declared

> [the statute] provides that different treatment be accorded to the applicants on the basis of their sex: it thus establishes a classification subject to scrutiny under the Equal Protection Clause. 404 U.S. at 75.

Recognizing that the governmental interest urged to support the Idaho statute was "not without some legitimacy," 404 U.S. at 76, the Court nonetheless found the legislation constitutionally infirm because it provided "dissimilar treatment for men and women who are similarly situated." 404 U.S. at 77.

Reed was assessed by discerning courts*/ and commentators**/ as a harbinger of fundamental change in the Supreme Court's perspective with regard to sex-based classifications. Although the Reed opinion was laconic, it was apparent that the Court had departed significantly from the "traditional" equal protection analysis familiar in review of social and economic legislation. Sex-based distinctions were to be subject to "scrutiny," a word until Reed typically reserved for race discrimination cases where the term was paired with a requirement that the legislation meet a "compelling

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*/ See Eslinger v. Thomas, F.2d (4th Cir. March 28, 1973); Brenden v. Independent School District, 41 U.S. Law Week 2590 (8th Cir. April 18, 1973); Green v. Waterford Board of Education, 473 F.2d 629 (2d Cir., January 29, 1973); Moritz v. Commissioner, 469 F.2d 466 (10th Cir. 1972); Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972); La Fleur v. Cleveland Board of Education, 465 F.2d 1185 (6th Cir. 1972); Williams v. San Francisco Unified School District, 340 F.Supp. 438 (N.D. Calif. 1972); Heath v. Westerville Board of Education, 345 F.Supp. 501 (S.D. Ohio 1972); Robinson v. Rand, 340 F.Supp. 37 (D. Colo. 1972); Bray v. Lee, 337 F.Supp. 934 (D.Mass. 1972); Shull v. Columbus Municipal Separate School District, 338 F.Supp. 1376 (N.D. Miss. 1972); Reed v. Nebraska School Activities Ass'n, 341 F.Supp. 258 (D.Neb. 1972); Matter of Patricia A., 31 N.Y.2d 83, 335 N.Y.S. 2d 33 (1972).

**/ Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv.L.Rev. 1, 34 (1972); Note, 86 Harv. L.Rev. 568, 583-88 (1973).

interest" standard. "Traditional" equal protection rulings, by contrast, mandated judicial tolerance of a legislative classification unless it is "patently arbitrary": "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 306 U.S. 420, 426 (1961). See also Jefferson v. Hackney, 406 U.S. 535, 546 (1972); Dandridge v. Williams, 397 U.S. 471, 485(1970).

On May 14, 1973, in Frontiero v. Richardson, 41 U.S. Law Week 4609, a judgment comparable in significance to Brown v. Board of Education, 347 U.S. 483 (1954), the Court made explicit the incurable flaw in governmental schemes that accord different treatment to males and females solely on the basis of their sex: "since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members off a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility.... And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or to contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." Frontiero v. Richardson, 41 U.S. Law Week at 4612.

The 8-1 judgment of the Court in Frontiero invalidated a fringe benefit scheme that awarded male members of the military housing allowance and medical care for their wives, regardless of dependency, but authorized benefits for female members of the military only if they in fact supported their husbands. The differential at issue in Frontiero reflects a common statutory pattern. For dozens of examples on the federal level, see Petition for Certiorari, Appendix F, Commissioner of Internal Revenue v. Moritz, No. 72-1298 (March 22, 1973). Despite the obviously sweeping ramifications of rejection of this pervasive legislative pattern, the Court was unwilling to perpetuate approval of lump treatment of men and women. The message of Frontiero is clear: persons similarly situated, whether male or female, must be accorded even-handed treatment by the law. Legislative classifications may legitimately take account of need or ability; they may not be premised on unalterable sex characteristics that bear no necessary relationship to an individual's need, ability or life situation.

The plurality opinion in Frontiero, delivered by Justice Brennan, declares with unmistakable clarity that "classifications based upon sex, like classifications based on race, alienage or national origin, are inherently suspect and

must therefore be subjected to close judicial scrutiny."*/ While four Justices characterized sex classifications as "suspect," Justice Stewart, concurring in the judgment, preferred to label the distinction "invidious." All of the Justices, save the lone dissenter, rejected "administrative convenience" as justification for dissimilar treatment of men and women.

Frontiero concerned, as this case does, the assumption that women are destined for the care of husbands, home and children, men for participation in the world outside the home. Law-sanctioned assumptions of this kind, that fail to account for the substantial and dramatically increasing population of women and men who do not organize their lives according to the stereotype, have been relegated to the scrap heap by Frontiero.

It is plain that plaintiffs' claims in this case, exposed to the quality of judicial review required by Frontiero,**/ must prevail. As in Frontiero, the burden imposed

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*/ Contrast with the myopic statement in Hoyt, supra at 68, that "this case in no way resembles those involving race or color .... There is not present here the unfortunate atmosphere of ethnic or racial prejudice which underlay the situations presented in those earlier jury discrimination cases....", the awakening indicated in Frontiero, 41 U.S. Law Week at 4612: "the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries...."

**/ The Frontiero decision makes it abundantly clear that defendants misunderstand the "invidious" nature of sex discrimination and the scrutiny due to sex classifications. Even before Frontiero, the signposts were clear. See Reed v. Reed, supra; Stanley v. Illinois, supra.

on defendants to justify the sex-based differential is impossible to surmount. For convenient reference, and because of its overriding importance, a copy of Frontiero v. Richardson is annexed as an appendix to this brief.

2. Jury selection entails a fundamental right.

Strict review may be mandated in this case by the presence of another factor triggering closest scrutiny: a fundamental right. In Rodriguez v. San Antonio Independent School District, 41 U.S. Law Week 4407 (1973), the Supreme Court stated that the appellation "fundamental" is appropriate for "a right ... explicitly or implicitly guaranteed by the Constitution."

The right to an impartially constituted tribunal has been held to be specifically guaranteed to litigants by the due process clause of the fourteenth amendment: "a fair trial in a fair tribunal is an essential element of due process," Peters v. Kiff, supra at 501; "a just and fair trial by an unbiased, unprejudiced, and impartial tribunal is one of the great American constitutional principles. There can be no due process ... without it." Billingsley v. Clayton, 359 F.2d 13, 15 (5th Cir. 1966). See also Akins v. Texas, 325 U.S. 398 (1944); Mayfield v. Steed, 345 F.Supp. 806 (E.D. Ark. 1972); Heymann v. State of Louisiana, 269 F.Supp. 36 (E.D. La. 1967). Moreover, the right to an impartially chosen petit jury in a criminal trial is guaranteed not only by the due process clause in and of itself,

but also by the specific words of the sixth amendment, made applicable to the states via the due process clause in Duncan v. Louisiana, 391 U.S. 145 (1968).

As potential jurors as well, plaintiffs' right may be deemed "fundamental." The existence of a right to be eligible for jury service cannot be disputed -- numerous decisions, in both actions by members of allegedly excluded classes and actions by litigants alleging improper indictment or trial, have plainly recognized it. These decisions classify jury service as a "badge of citizenship" closely analogous to the vote. Carter v. Jury Commission, 396 U.S. 320, 330 (1969); Mitchell v. Johnson, 250 F.Supp. 117, 121 (M.D. Ala. 1966). See also Broadway v. Culpepper, 439 F.2d 1253 (5th Cir. 1971); Manns v. Allmann, 324 F.Supp. 114 (W.D. Va. 1971); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946); White v. Crook, supra. While this right is not explicitly guaranteed by the words of the Constitution, an implicit guarantee may be identified, for the right to jury service is appropriately viewed as an essential sixth amendment accoutrement, cf. Griswold v. Connecticut, 381 U.S. 479 (1965), without which the right to trial by an impartial jury of one's peers could not be secured.

3. The "benign" classification that serves to keep women in their place.

It might be argued by persons who overlook the harmful effects of "special treatment" for women that the question whether a "suspect" or "invidious" classification, or

a "fundamental right" is involved in this case is irrelevant, at least insofar as it concerns female plaintiffs as potential jurors. For the nature of the classification, on surface inspection,may not appear invidious -- women are afforded the "special benefit" of not having to serve on juries. This superficial assessment may explain the Court's unwillingness in Hoyt to consider classification of women in a context similar to this as "suspect" -- apparently, in the Court's view, Florida women were being advantaged by that classification. But absence of responsibility for jury service is hardly an unmixed blessing. Jury duty, as noted above, cannot be characterized simply as a burden -- it is a vital right, a "crucial citizen responsibilit[y]," Broadway v. Culpepper, supra at 1258, and the Louisiana jury laws plainly impede plaintiffs' access to that right.

The automatic exemption from jury service which Louisiana extends to women is an indicia of second class citizenship, a reflection of the state's conception of women as a class not capable of shouldering the same civic rights and responsibilities as men: "statutes exempting women from jury service ... reflect the historical male prejudice against female participation in activities outside the family circle." Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L.Rev. 675, 718 (1971). In short, while the provisions challenged here do not work an absolute denial to women of their right to serve on juries, they are

founded on a premise, similar to the premise once responsible for the exclusion of blacks from juries, that women are not equipped to participate in important community affairs: the Louisiana provisions betray "a view of woman's role which cannot withstand scrutiny under modern standards." Alexander v. Louisiana, 405 U.S. 625, 639-40 (1971) (concurring opinion).

A clear illustration of the invidious effect of the supposed "benign" classification is the response of a New York trial court in 1970 to the challenge of a female plaintiff to a jury system providing automatic exemption for any woman on request. Plaintiff's "lament," the judge stated, should be addressed to her sisters who prefer "cleaning and cooking, bridge and canasta, the beauty parlor and shopping, to becoming embroiled in plaintiff's problems...." De Kosenko v. Brandt, 63 Misc. 2d 895, 898, 313 N.Y.S. 2d 827, 830 (Sup. Ct. 1970). Ignored by the court was the fact that "neither man nor woman can be expected to volunteer for jury service," Alexander, concurring opinion, supra at 643, that few persons, male or female, would voluntarily assume all the varied civic responsibilities imposed on them, and that in failing to recognize women as persons with full civic responsibilities as well as rights, New York, like Louisiana, displays a view of women as something less than mature adult citizens.*/

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*/ Other states have been more enlightened. By 1970, a majority of the states had totally eliminated exemptions for females only. Hearings on S.J.Res. 61 before Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong. 2d Sess. 725-27 (1970).

4. Contemporary definition of "exclusion" from jury service.

The standard phrase employed by courts to summarize what plaintiffs must establish in jury selection challenges is, as noted supra, "the exclusion of identifiable segments of the community." Apodaca v. Oregon, supra at 413. The definition of "identifiable segment" has already been discussed: women clearly constitute an "identifiable segment of the community." See Ballard v. United States, supra. "Exclusion" is established initially by the existence of a significant downward variation between the size of a "cognizable group" in the population of a community, and the proportion of that community's jury rolls which the group occupies. Hodnett v. Slayton, 343 F.Supp. 1142 (W.D. Va. 1972). If that disparity exists, then the plaintiff must demonstrate either "additional positive indicia of discrimination" or "that the selection procedure provides an opportunity to discriminate." Hodnett, supra at 1146; see also Alexander v. Louisiana, supra. In other words, plaintiffs must show that the disparity is not merely the product of chance. To put the matter concretely, when exclusionary devices were less subtle, black plaintiffs were usually able to prove complete denial of eligibility for jury service to members of their race. See, e.g., Norris v. Alabama, 294 U.S. 587 (1934). Over the years, however, courts have evolved a definition of "exclusion" which turns on the disproportion between the representation of a class of citizens in society and on jury rolls, and requires invalidation of systems providing for token inclusions of members of "cognizable groups." Scott v. Walker, 358 F.2d 561 (5th Cir. 1966).

The requirement of exclusion is plainly satisfied by plaintiffs here: "as a practical matter, automatic exemption equals automatic exclusion." Note, Women Jurors--Automatic Exemption, 36 Tul. L. Rev. 858, 861 (1962); "the automatic exemption, coupled with the failure even to apprise parish women of their right to volunteer, results in as total an exclusion as would obtain if women were not permitted to serve at all." Alexander, supra at 643 (concurring opinion). Clearly a large disparity exists between the proportion of women in the community and the proportion of women on the jury rolls. Moreover, there is no need to attempt to point to specific instances in which defendant jury commissioners have discriminated against females, for it is apparent from the face of the challenged provisions that the number of women on jury rolls is not a matter of chance. No mere "opportunity to discriminate" exists here; discrimination is positively mandated by the law which forbids jury commissioners to put female names on the jury venires. Obviously, the paucity of women jurors derives directly from the automatic exemption afforded them. Even a well-financed and continuing effort by defendants to inform women of their rights and encourage them to register for service would not overcome the legislative roadblock. For there can be little doubt that men or women, given the opportunity, would respond in the same way to an automatic exemption.

Perhaps because the concept of "exclusion" was still in the process of evolution at the time of the Hoyt decision, the Court focused on the Norris pattern, i.e., a deliberate, blanket shut-out, and concluded that "the relative paucity of women jurors does not carry the constitutional weight appellant would have it bear." Hoyt, supra at 65.*/ Under currently operative standards, however, all that need be demonstrated is that the jury selection mechanism may be at least partially responsible for the conspicuous disproportion. Alexander v. Louisiana, supra; Arnold v. North Carolina, 376 U.S. 773 (1963); Eubanks v. Louisiana, 356

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*/ Even more obsolete than the Hoyt decision is the Supreme Court's reasoning in Fay v. New York, 332 U.S. 261 (1947), which upheld New York's practice of not calling women to serve on its "blue ribbon" jury panels. In Fay, the Court assumed that cases involving Negro exclusions were "in a class by themselves," Fay, supra at 282, and that exclusion of other groups, specifically women, was justifiable under due process. As discussed above, the notion that "cognizable groups" are limited to blacks was rejected by the Court in Hernandez v. Texas, supra.

Fay is an anachronism for other reasons. It is premised upon the view of women's role vis-a-vis jury service taken by most of the states at the time it was decided: "in 1942 only 28 states permitted women to serve on juries and they were still disqualified in the other 20." Fay, supra at 289. Today, Louisiana is the only state in the nation which does not put women on its jury rolls as a matter of course. Moreover, as the Fay court pointed out, at that time Congress implicitly approved state exclusion of women from juries by requiring federal courts to follow jury selection procedures in effect in the states in which they sat. The federal government now mandates that all federal juries be chosen from unexpurgated voter registration lists, 28 U.S.C. §1863, and that no discrimination based on race, color, creed, or sex be practiced in the selection of jurors 28 U.S.C. §1862. Further, Fay declared that the male defendant could not assert the exclusion of a class of which he was not a member -- a rule now explicitly overruled. Peters v. Kiff, supra; see also Mayfield v. Steed, supra Fay also relied on the theory, since rejected, that for exclusion to be unconstitutional, it must not only be overt, but intentional. See Alexander v. Louisiana, supra; Salary v. Wilson, supra.

U.S. 584 (1957); Avery v. Georgia, 345 U.S. 559 (1953); Ford v. White, supra; Salary v. Wilson, supra; Stephens v. Cox, 449 F.2d 657 (4th Cir. 1971); Hodnett v. Slayton, supra.

5. No "compelling state interest" justifies Louisiana's "special treatment" of women for jury service purposes.

As plaintiffs are members of a "cognizable group" which has been "excluded" from jury service, and moreover should be regarded as members of "suspect" or "invidious" classification whose access to a "fundamental right" has been impeded by the state, their claims should receive the strict constitutional review which both the reasoning in jury discrimination cases and equal protection analysis demand. The statutes here challenged cannot survive such review, for they are unsupported by any "compelling state interest." See Frontiero v. Richardson, supra at 4612; McLaughlin v. Florida, 379 U.S. 184 (1964); Loving v. Virginia, 388 U.S. 1 (1967).

When legislation is subjected to "strict scrutiny" review, "the burden of justification is cast upon the state rather than on the challenging party." Note, Developments in the Law -- Equal Protection, 82 Harv.L. Rev. 1065, 1101 (1969). Defendants cannot discharge this burden, for the apparent justification, administrative convenience, hardly ranks as an "overriding statutory purpose." Frontiero v. Richardson, supra, 41 U.S. Law Week at 4613; see also Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969). Indeed, the "special treatment" of women works against the "overriding" purpose of the Louisiana jury selection laws, which logically must be to secure the service of ample numbers of qualified jurors. By exempting women from service, Louisiana deprives

its trial courts of an important source of jurors.

Moreover, if a purpose of the classification is to provide for the care of young children, to ensure that they are not left without caretakers when their parents are called for jury service, the gross technique employed cannot pass constitutional muster, for it is at the same time appallingly overbroad and stereotypically underinclusive. Childless women and women whose children are cared for by others are accorded the same "special treatment" as women in fact responsible for the care of young children; men responsible for the care of young children are not part of the statutory classification. Other, far more appropriate alternatives are available to advance the legitimate interest in assuring care for young children, for example, jury laws which provide exemption for any "person" responsible for a young child's care. See N.J.S.A. 8A: 69-1, 2(9); see also Revised Codes of Montana §93-1304 (12). Thus, under strict scrutiny, the challenged jury laws and the classification they embody must necessarily be declared unconstitutional -- no compelling interest can be advanced to support them, and other methods are available to the state to accomplish any legitimate objectives the statutes might serve.

6. No fair and substantial relationship exists between the sex-based means employed in the challenged statutes and any legitimate state objective.

The resemblance between the legislation challenged in this case and the statutes involved in Frontiero and Reed is apparent. All three purport to serve the end of administra-

tive convenience; all of them rest on stereotypical assumptions about the roles of men and women. The classification plaintiffs challenge, as noted supra, has two conceivable objectives: administrative convenience, and ensuring care and supervision of children. Administrative convenience was precisely the rationale for sex-based classification held insufficient in Frontiero and Reed:

> [A]lthough efficacious administration of governmental programs is not without some importance, "the constitution recognizes higher values than speed and efficiency." Stanley v. Illinois, 405 U.S. 645, 656 (1972).... [In] the realm of "strict judicial scrutiny"... any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience necessarily commands "dissimilar treatment for men and women who are ... similarly situated," and therefore involves the "very kind of arbitrary legislative choice forbidden by the [Constitution]...." Reed v. Reed, supra, at 77, 76. Frontiero, supra at 4613.

As the Louisiana jury provisions mandate "dissimilar treatment" for reasons kin to those reflected in the statutes before the Court in Frontiero and Reed, the Louisiana provisions must be held to violate the command of equal protection.

Nor can it be claimed that plaintiffs here, unlike the complainants in Frontiero and Reed, are not "circumstanced similarly" to men for purposes of jury service. The argument that women, as housekeepers and mothers, do not hold jobs from which absence is manageable, ignores the reality that many women do not perform the housekeeper-mother role, that some who do perform that role have ample assistance at home, and that, particularly in young families, the home burden is increasingly shared by men and

women. In short, the Hoyt image of women "as the center of home and family life," of dubious accuracy for many women in 1961, is today recognized as a stereotype of the same order as those firmly rejected as a basis for legislative line-drawing in Frontiero and Reed. See also Stanley v. Illinois, 405 U.S. 645(1972).

In 1972, 60% of all married women living with their husbands were gainfully employed, and 42% of all working women were employed full-time the year round. U.S. Women's Bureau, Dept. of Labor, Highlights of Women's Employment and Education (1973). Thus, the Louisiana jury service exemption for women covers a substantial population of wives and mothers for whom homemaking and child care concerns do not preclude active involvement in employment outside the home. Moreover, the assumption that women lead full-time home and child-centered lives has scant reality for childless women, married or single, and for women whose children have reached school age. See Johnston & Knapp, supra at 718. For these women, automatic exemption from jury service is wholly irrational they do not perform the duties apparently envisioned by the Louisiana legislature. Whether they are gainfully employed or function as homemakers, they cannot be placed in a class apart from men, many of whom may find jury service severely burdensome.

Women and men then, with the possible exception of persons responsible for the care of very young children, are "similarly circumstanced" for the purpose of jury service. Classification of all women for automatic exemption is stunningly overinclusive and, under Frontiero and Reed, inevitably unconstitutional. Like the statute in Frontiero and Reed, the legislative classification here challenged makes an "arbitrary choice" premised upon wholly mistaken conceptions of the role of women in today's world. See Alexander, supra at 639 (concurring opinion); if it advances any legitimate objective, it does so in a manner inconsistent with equal protection standards.

B. Male plaintiffs

Male plaintiffs claim that the exemption from jury service automatically extended only to women by Louisiana constitutes an arbitrary, irrational, and overbroad classification, discriminating against them and the class they represent in violation of the equal protection clause of the fourteenth amendment. Recognizing the important "right" aspect of jury duty, these plaintiffs point out that jury service also has its onerous side, that it is both "a right and a responsibility that should be shared by all citizens regardless of sex." White v. Crook, supra at 408. It is unconstitutional, they claim, to impose upon them, solely on the basis of their sex, so disproportionate a share of the jury service right-responsibility.

The "close scrutiny" of sex classifications employed by the Supreme Court in Frontiero and Reed, supra, is applicable here. The sex-based criterion at issue in Frontiero and Reed was held an "arbitrary legislative choice." Presumably that choice would have been no less "arbitrary" had it been made in favor of women. Cf. Stanley v. Illinois, supra. This view of Reed was accepted and applied by the Tenth Circuit in Moritz v. Commissioner of Internal Revenue, 469 F.2d 466 (10th Cir. 1972). In Moritz, the denial, which the court found was made on the basis of sex, of an income tax deduction for expenses incurred by male plaintiff in providing care for his invalid mother was declared a violation of equal protection. "When placed under the scrutiny required in viewing sex discrimination, Reed v. Reed, supra," the court said, "we find justification for the discrimination lacking.... It is not one having a fair and substantial relation to the object of the legislation dealing with the amelioration of burdens on the taxpayer." Moritz, supra at 470. Significantly, the Frontiero opinion cites Moritz with approval. 41 U.S. Law Week at 4613 n.25. */

Applying the Frontiero, Reed-Moritz rationale here, the classification of which male plaintiffs complain must fall. For the basic premise of these decisions is that legislative classifications must treat men and women "similarly circumstanced"

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*/ Note too that the sex-based classification in Frontiero was invalidated in response to the joint complaint of Sharron and Joseph Frontiero. Both claimed that the statutory scheme worked invidious discrimination against men as well as women via its assumption that women tend the home, men the world outside it.

alike. As noted above in the discussion of female plaintiffs' equal protection claim, the jury service exemption for women does not treat alike all "similarly circumstanced" persons -- women in precisely the same situation as men for purposes of the provisions are recipients of "special treatment." Similar to the classification in Moritz, this exemption places a burden upon men not justified by any fair and substantial relation to the statutory objective. Correspondingly, the exemption overbroadly relieves women from sharing the burden. Moreover, men and women similarly circumstanced with regard to an underlying purpose of the classification in that they are responsible for the care of small children are not treated alike. In sum, as discussed above in the context of female plaintiffs' equal protection claims, the classification does not advance a legitimate legislative objective in a fashion consistent with the constitutional mandate.

IV. Article 402 of the Louisiana Code of Criminal Procedure, Louisiana R.S. 13:3055, and Section 41 of Article 7 of the Louisiana Constitution Require Defendant Jury Commissioners to Pursue a Course that Collides with their Obligations under the Federal Constitution.

The challenged jury selection provisions compel the administrative officials charged with their enforcement to follow a course of conduct at odds with the strictures of the fourteenth amendment. As the Fifth Circuit stated in Brooks v. Beto, supra, the Constitution places upon these

officials "a specific, tangible, identifiable burden.... They must uncover the source of competent jury prospects from all significantly identifiable elements of the community." Brooks, supra at 12. See also Smith v. Yeager, supra; Salary v. Wilson, supra; Mobley v. United States, 379 F.2d 768 (5th Cir. 1967); U.S. ex rel Seals v. Wiman, supra, Bary v. United States, 248 F.2d 201 (10th Cir. 1957).

The Louisiana jury commissioners are disarmed by state law from satisfying their federal constitutional obligation. Women, as discussed above, are plainly an "identifiable" element in the community. But the commissioners may not initially list any female names. Moreover, good faith efforts by defendant jury commissioners to encourage women to volunteer would not suffice to overcome the statutory barrier. "[T]hose charged with administering the jury selection machinery may not transfer to the Negro community or to any other segment of the community the responsibility placed by law upon them...." Salary v. Wilson, supra at 472 (emphasis supplied).

In short, the exemption of Louisiana female citizens from jury service makes it impossible for Louisiana jury commissioners to comply with the constitutional obligations inherent in their position. Clearly the laws which put this unconstitutional strait jacket on the activities of those commissioners should be invalidated.

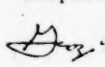
Finally, it should be noted that the Louisiana jury laws, by setting up tribunals upon which barely half the population is represented, contribute to the creation of conditions for the administration of justice that are less than optimal. The fact that the law itself places obstacles in the way of representative lay participation in trial courts serves to diminish respect for that law. Thus, the injury which the Louisiana jury service exemption for women inflicts is not limited to plaintiffs here or to the classes they represent; "there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." Ballard v. United States, 329 U.S.187, 195 (1945).

CONCLUSION

For the reasons stated above, defendants motion to dismiss should be denied, and plaintiffs motion for summary judgment should be granted; Louisiana Code of Criminal Procedure Art. 402, Louisiana R. S. 13:3055, and Section 41 of Art. 7 of the Louisiana Constitution should be declared unconstitutional facially and as applied to plaintiffs and the classes they represent, to the extent that these provisions mandate dissimilar treatment of similarly situated men and women; an injunction should issue restraining defendants

from enforcing the aforesaid provisions and requiring them to accord plaintiffs and the classes they represent equal rights and responsibilities with respect to selection for the general venire, grand jury venires and petit jury venires, and the grand and petit juries drawn therefrom.

Respectfully submitted,



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APPENDIX

Frontiero v. Richardson,

___ U.S. ___ (May 14, 1973)

No. 71-1694

Sharron A. Frontiero and Joseph Frontiero, Appellants, v. Elliot L. Richardson, Secretary of Defense, et al. | On Appeal from the United States District Court for the Middle District of Alabama.

[May 14, 1973]

Syllabus

A married woman Air Force officer (hereafter appellant) sought increased benefits for her husband as a "dependent" under 37 U. S. C. §§ 401, 403, and 10 U. S. C. §§ 1072, 1076. Those statutes provide, solely for administrative convenience, that spouses of male members of the uniformed services are dependents for purposes of obtaining increased quarters allowances and medical and dental benefits, but that spouses of female members are not dependents unless they are in fact dependent for over one-half of their support. When her application was denied for failure to satisfy the statutory dependency standard, appellant and her husband brought this suit in District Court, contending that the statutes deprived servicewomen of due process. From that Court's adverse ruling, they took a direct appeal. *Held:* The judgment is reversed. 341 F. Supp. 201, reversed.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL, concluded that 37 U. S. C. §§ 401, 403 and 10 U. S. C. §§ 1072, 1076, as inherently suspect statutory classifications based on sex, are so unjustifiably discriminatory as to violate the Due Process Clause of the Fifth Amendment.

MR. JUSTICE STEWART concluded that the challenged statutes work an invidious discrimination in violation of the Constitution. *Reed* v. *Reed*, 404 U. S. 71.

MR. JUSTICE POWELL, joined by THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN, while agreeing that the statutes deprive servicewomen of due process, concluded that in the light of *Reed* v. *Reed*, 404 U. S. 71, and the fact that the Equal Rights Amendment has been submitted to the States for ratification, it is inappropriate to decide at this time whether sex is a suspect classification.

BRENNAN, J., announced the Court's judgment and delivered an opinion, in which DOUGLAS, WHITE, and MARSHALL, JJ., joined. STEWART, J., filed a statement concurring in the judgment. POWELL, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and BLACKMUN, J., joined. REHNQUIST, J., filed a dissenting statement.

MR. JUSTICE BRENNAN announced the judgment of the Court and an opinion in which MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join.

The question before us concerns the right of a female member of the uniformed services[1] to claim her spouse as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits under 37 U. S. C. §§ 401, 403, and 10 U. S. C. §§ 1072, 1076, on an equal footing with male members. Under these statutes, a serviceman may claim his wife as a "dependent" without regard to whether she is in fact dependent upon him for any part of her support. 37 U. S. C. § 401 (1); 10 U. S. C. § 1072 (A). A servicewoman, on the other hand, may not claim her husband as a "dependent" under these programs unless he is in fact dependent upon her for over one-half of his support. 37 U. S. C. § 401; 10 U. S. C. § 1072 (2)(C).[2] Thus, the question for decision is whether this difference in treatment constitutes an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment. A three-judge District Court for the Middle District of Alabama, one judge dissenting, rejected this contention and sustained the constitutionality of the provisions of the statutes making this distinction. 341 F. Supp. 201 (1972). We noted probable jurisdiction. 409 U. S. — (1972). We reverse.

I

In an effort to attract career personnel through reenlistment, Congress established, in 37 U. S. C. § 401 *et seq.*, and 10 U. S. C. § 1071 *et seq.*, a scheme for the provision of fringe benefits to members of the uniformed services on a competitive basis with business and industry.[3] Thus, under 37 U. S. C. § 403, a member of the uniformed services with dependents is entitled to an increased "basic allowance for quarters" and, under 10 U. S. C. § 1076, a member's dependents are provided comprehensive medical and dental care.

Appellant Sharron Frontiero, a lieutenant in the United States Air Force, sought increased quarters allowances, and housing and medical benefits for her husband, appellant Joseph Frontiero, on the ground that he was her "dependent." Although such benefits would automatically have been granted with respect to the wife of a male member of the uniformed services, appellant's application was denied because she failed to demonstrate that her husband was dependent on her for more than one-

[1] The "uniformed services" include the Army, Navy, Air Force, Marine Corps, Coast Guard, Environmental Science Services Administration, and Public Health Service. 37 U. S. C. § 101 (3); 10 U. S. C. § 1072 (1).

[2] 37 U. S. C. § 401 provides in pertinent part:

"In this chapter, 'dependent,' with respect to a member of a uniformed service, means—

"(1) his spouse;

. . . . . .

"However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support. . . ."

10 U. S. C. § 1072 (2) provides in pertinent part:

"'Dependent,' with respect to a member . . . of a uniformed service, means—

"(A) the wife;

. . . . . .

"(C) the husband, if he is in fact dependent on the member . . . for over one-half of his support. . . ."

[3] See 102 Cong. Rec., 84th Cong., 2d Sess., 3849-3850 (Cong. Kilday), 8011 (Sen. Saltonstall); 95 Cong. Rec., 81st Cong., 1st Sess., 7662 (Cong. Kilday), 7664 (Cong. Short), 7666 (Cong. Havenner), 7667 (Cong. Bates), 7671 (Cong. Price). See also 10 U. S. C. § 1071,

half of his support." Appellants then commenced this suit, contending that by making the distinctions the statutes purposefully discriminate on the basis of sex in violation of the Due Process Clause of the Fifth Amendment.[1] In essence, appellants asserted that the discriminatory impact of the statutes is two-fold: first, as a procedural matter, a female member is required to demonstrate her spouse's dependency, while no such burden is imposed upon male members; and second, as a substantive matter, a male member who does not provide more than one-half of his wife's support receives benefits, while a similarly situated female member is denied such benefits. Appellants therefore sought a permanent injunction against the continued enforcement of these statutes and an order directing the appellees to provide Lieutenant Frontiero with the same housing and medical benefits that a similarly situated male member would receive.

Although the legislative history of these statutes sheds virtually no light on the purposes underlying the differential treatment accorded male and female members,[2] a majority of the three-judge District Court surmised that Congress might reasonably have concluded that, since the husband in our society is generally the "breadwinner" in the family—and the wife typically the "dependent" partner—"it would be more economical to require married female members claiming husbands to prove actual dependency than to extend the presumption of dependency to such members." 341 F. Supp., at 207. Indeed, given the fact that approximately 99% of all members of the uniformed services are male, the District Court speculated that such differential treatment might conceivably lead to a "considerable saving of administrative expense and manpower." *Ibid.*

II

At the outset, appellants contend that classifications based upon sex, like classifications based upon race,[3] alienage,[4] and national origin,[5] are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree and, indeed, find at least implied support for such an approach in our unanimous decision only last Term in *Reed v. Reed*, 404 U. S. 71 (1971).

In *Reed*, the Court considered the constitutionality of an Idaho statute providing that, when two individuals are otherwise equally entitled to appointment as administrator of an estate, the male applicant must be preferred to the female. Appellant, the mother of the deceased, and appellee, the father, filed competing petitions for appointment as administrator of their son's estate. Since the parties, as parents of the deceased, were members of the same entitlement class, the statutory preference was invoked and the father's petition was therefore granted. Appellant claimed that this statute, by giving a mandatory preference to males over females without regard to their individual qualifications, violated the Equal Protection Clause of the Fourteenth Amendment.

The Court noted that the Idaho statute "provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause." 404 U. S., at 75. Under "traditional" equal protection analysis, a legislative classification must be sustained unless it is "patently arbitrary" and bears no rational relationship to a legitimate governmental interest. *See Jefferson v. Hackney*, 406 U. S. 535, 546 (1972); *Richardson v. Belcher*, 404 U. S. 78, 81 (1971); *Flemming v. Nestor*, 363 U. S. 603, 611 (1960); *McGowan v. Maryland*, 366 U. S. 420, 426 (1961); *Dandridge v. Williams*, 397 U. S. 471, 485 (1970).

In an effort to meet this standard, appellee contended that the statutory scheme was a reasonable measure designed to reduce the workload on probate courts by eliminating one class of contests. Moreover, appellee argued that the mandatory preference for male applicants was in itself reasonable since "men [are] as a rule more conversant with business affairs than . . . women."[6] Indeed, appellee maintained that "it is a matter of common knowledge, that women still are not engaged in politics, the professions, business or industry to the extent that men are."[7] And the Idaho Supreme Court, in

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[1] Appellant Joseph Frontiero is a full-time student at Huntingdon College in Montgomery, Alabama. According to the appellants' stipulation of facts, his living expenses, including his share of the household expenses, total approximately $354 per month. Since he receives $296 per month in veterans' benefits, it is clear that he is not dependent upon appellant Sharron Frontiero for more than one-half of his support.

[2] "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discriminations that are so unjustifiable as to be violative of due process." *Schneider v. Rusk*, 377 U. S. 163, 168 (1964); *see Morton v. Mancari*, 94 S. Ct. 2474, 2483-2482 (1974); *Boiling v. Sharpe*, 347 U. S. 497 (1954).

[3] The housing provisions of the Act of 1947, 61 Stat. 645, were enacted as part of the Career Compensation Act of 1949, which established a uniform system of military pay and allowances, consolidating and revising the personal legislation that had been considered over the years, in all areas. *See* H. R. Rep. No. 570, 81st Cong., 1st Sess., 9 (1949); S. Rep. No. 733, 81st Cong., 1st Sess. (1949). The Act apparently retained in substance the dependency definitions of § 4 of the Pay Readjustment Act of 1942, 56 Stat. 361, as amended by § 6 of the Act of September 7, 1944, 58 Stat. 740, which required a female member of the service to demonstrate her spouse's dependency. It appears that these provisions were still derived from congressional action contemporaneous *See* S. Rep. No. 917, 76th Cong., 3d Sess., 6.

The medical benefits legislation, 37 U. S. C. § 401 *et seq.*, was enacted as the Dependents' Medical Care Act of 1956. As such, it was designed to make the military family benefits system more nearly comparable to civilian programs. In this regard, the Senate Armed Services Committee explained that the dependents' benefits would not only enhance the effectiveness of the career force, but would also "aid in the recruitment of new personnel." S. Rep. No. 1845, 84th Cong., 2d Sess.; H. Rep. No. 1959, 84th Cong., 2d Sess.

[4] *See Loving v. Virginia*, 388 U. S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U. S. 184, 191-192 (1964); *Boiling v. Sharpe*, 347 U. S. 497, 499 (1954).

[5] *See Graham v. Richardson*, 403 U. S. 365, 372 (1971).

[6] *See Oyama v. California*, 332 U. S. 633, 644-646 (1948); *Korematsu v. United States*, 323 U. S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U. S. 81, 100 (1943).

[7] Brief of Appellee, at 12, *Reed v. Reed*, 404 U. S. 71 (1971).

[1] *Id.*, at 12-13.

upholding the constitutionality of the statute, suggested that the Idaho Legislature might reasonably have "concluded that in general men are better qualified to act as an administrator than are women."[6]

Despite these contentions, however, the Court held the statutory preference for male applicants unconstitutional. In reaching this result, the Court implicitly rejected appellee's apparently rational explanation of the statutory scheme, and concluded that, by ignoring the individual qualifications of particular applicants, the challenged statute provided "dissimilar treatment for men and women who are . . . similarly situated." *Reed v. Reed*, *supra*, at 77. The Court therefore held that, even though the State's interest in achieving administrative efficiency "is not without some legitimacy," "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the [Constitution]. . . ." *Id.*, at 76. This departure from "traditional" rational basis analysis with respect to sex-based classifications is clearly justified.

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination.[7] Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women not on a pedestal, but in a cage. Indeed, this paternalistic attitude became so firmly rooted in our national consciousness that, exactly 100 years ago, a distinguished member of this Court was able to proclaim:

> "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .
>
> ". . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator." *Bradwell v. Illinois*, 83 U. S. [16 Wall.] 130, 141 (1873) (Bradley, J., concurring).

As a result of notions such as these, our statute books gradually became filled with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. *See generally* L. Kanowitz, Women and the Law: The Unfinished Revolution 3-6 (1969); G. Myrdal, An American Dilemma 1073 (2d ed. 1962). And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself "preservative of other basic civil and political rights"—until adoption of the Nineteenth Amendment half a century later.

It is true, of course, that the position of women in America has improved markedly in recent decades.[8] Nevertheless, it can hardly be doubted that, in part because of the high mobility of the sex characteristic,[9] women still face pervasive, although at times more subtle, discrimination in our educational institutions, on the job market and, perhaps most conspicuously, in the political arena.[10] *See generally*, K. Amundsen, The Silenced Majority: Women and American Democracy (1971); The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice (1970).

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ." *Weber v. Aetna Casualty & Surety Co.*, 406 U. S. 164, 175 (1972). And what differentiates sex from such nonsuspect statutes as intelligence or physical handicap, and aligns it with the recognized suspect criteria, is that the sex characteristic

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[6] *Reed v. Reed*, 92 Idaho 511, 516, 455 P. 2d 620, 625 (1970).

[7] Indeed, the position of women in this country is so exceptional to be noted in the now-famous 1st Chapter of Alexis de Tocqueville's Democracy in America, pt. 2 (Reeves tr. 1900), in World's Classics Series 400 (Galaxy ed. 1947).

[8] *Reynolds v. Sims*, 377 U. S. 533, 562 (1964); *see Dyer v. Blackwell*, 405 U. S. 1205, 1206 (1972) (Douglas, J., Circuit Justice); *Board of Curators, Univ. of Missouri v. Horowitz*, 435 U. S. 78, 89 (1978); *Vlandis v. Kline*, 412 U. S. 441, 446 (1973); *Carrington v. Rash*, 380 U. S. 89, 96 (1965); *Harper v. Virginia Board of Elections*, 383 U. S. 663, 670 (1966); *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1886).

[9] *See generally*, The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice (1970); L. Kanowitz, Women and the Law: The Unfinished Revolution (1969); A. Montagu, Man's Most Dangerous Myth (4th ed. 1964); The President's Commission on the Status of Women, American Women (1963).

[10] *See, e. g.*, Note, Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?, 84 Harv. L. Rev. 1499, 1507 (1971).

[11] It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless in part because of prior discrimination, women are vastly underrepresented in the Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman governor sits in the United States Senate, and only 16 women hold seats in the House of Representatives. And, as appellants point out, this underrepresentation is present throughout all levels of our State and Federal Governments. *See* Brief of Appellants and American Civil Liberties Union (Amicus Curiae) 9.

frequently bears no relation to ability to perform or contribute to society." As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

We might also note that, over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications. In Tit. VII of the Civil Rights Act of 1964, for example, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of "race, color, religion, sex, or national origin." [*] Similarly, the Equal Pay Act of 1963 provides that no employer covered by the Act "shall discriminate . . . between employees on the basis of sex." [*] And § 1 of the Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." [*] Thus, Congress has itself concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration. Cf. *Oregon* v. *Mitchell*, 400 U. S. 112, 240, 248–249 (1970); *Katzenbach* v. *Morgan*, 384 U. S. 641, 648–649 (1966).

With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is unconstitutional invalid.

III

The sole basis of the classifications established in the challenged statutes is the sex of the individuals involved. Thus, under 37 U. S. C. §§ 401, 403, and 10 U. S. C. §§ 2072, 2076, a female member of the uniformed services seeking to obtain housing and medical benefits for her spouse must prove his dependency in fact, whereas no such burden is imposed upon male members. In addition, the statutes operate so as to deny benefits to a female member, such as appellant Sharron Frontiero, who provides less than one-half of her spouse's support, while at the same time granting such benefits to a male member who likewise provides less than one-half of his spouse's support. Thus, to this extent at least, it may fairly be said that these statutes command "dissimilar treatment for men and women who are . . . similarly situated." *Reed* v. *Reed*, *supra*, at 77.

Moreover, the Government concedes that the differential treatment accorded men and women under these statutes serves no purpose other than mere "administrative convenience." In essence, the Government maintains that, as an empirical matter, wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives. Thus, the Government argues that Congress might reasonably have concluded that it would be both cheaper and easier simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact. [*]

The Government offers no concrete evidence, however, tending to support its view that such differential treatment in fact saves the Government any money. In order to satisfy the demands of strict judicial scrutiny, the Government must demonstrate, for example, that it is actually cheaper to grant increased benefits with respect to all male members, than it is to determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependency requirement. Here, however, there is substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits. [*] And in light of the fact that the

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[*] See, e. g., Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1073–1074 (1969).

[*] 42 U. S. C. §§ 2000e–2 (a), (e) (Employers added.) See generally, Note, 4 Harv. Tax. VII Remembered: The Equal Employment Opportunity Act of 1972, 86 Geo. Wash. L. Rev. 950 (1972); Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971).

[*] 29 U. S. C. § 206 (d). (Employers added.) See generally, Murphy, Female Wage Discrimination: A Study of the Equal Pay Act 1963–1970, 39 U. Cin. L. Rev. 615 (1970).

[*] H. J. Res. No. 208, 92d Cong., 2d Sess. (1972). In accordance with these principles, Congress is moved every day amended statutory schemes which tend to treat persons under certain laws in such a manner as to eliminate the differential treatment of men and women. See 5 U. S. C. § 2108, as amended, 85 Stat. 644; 5 U. S. C. § 7152, as amended, 85 Stat. 644; 5 U. S. C. § 8341, as amended, 84 Stat. [illegible]; 26 U. S. C. § 167 (h), as amended, 86 Stat. 1054.

[*] It should be noted that these statutes are not in any sense designed to remedy the effects of past discrimination against women. See *Gruenwald* v. *Gardner*, 390 F. 2d 591 (CA2 1968), cert. denied, 393 U. S. 992 (1968); cf. *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966). On the contrary, these statutes rest upon a gross assumption—that base historically reflected discrimination in employment, and not on the effects of that past discrimination or a particular need for benefits on widowed servicemen as well. Cf. *United States* v. *Guest County*, 383 U. S. 745, 756–757 (1966).

[*] In 1971, 43% of all women over the age of 16 were in the labor force, and 18% of all women worked full-time 12 months per year. See U. S. Women's Bureau, Dept. of Labor, Highlights of Women's Employment & Education 1 (W. B. Pub. No. 71-191, March 1972). Moreover, 41.5% of all married women are employed. See U. S. Bureau of Labor Statistics, Dept. of Labor, Work Experience of the Population in 1971 & Unemployment Special Labor Force Report, August 1972). It is also noteworthy that, while the median income of a male member of the armed forces is approximately $6,000, see The Report of the Fiscal Council on an All Volunteer Armed Force 56, 101 (1970), the median income for all women over the age of 14, including those who are not employed, is approximately $3,223. See U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States Table No. 565 (1972). Applying the

dependency determination with respect to the husbands of female members is presently made solely on the basis of affidavit, rather than through the more costly hearing process." the Government's explanation of the statutory scheme is, to say the least, questionable.

In any case, our past decisions make clear that, although efficient administration of governmental programs is not without some importance, "the Constitution recognizes higher values than speed and efficiency." *Stanley* v. *Illinois*, 405 U. S. 645, 656 (1972). And when we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality. *See Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Carrington* v. *Rash*, 380 U. S. 89 (1965). On the contrary, any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands "dissimilar treatment for men and women who are . . . similarly situated," and therefore involves the "very kind of arbitrary legislative choice forbidden by the [Constitution]. . . ." *Reed* v. *Reed*, *supra*, at 77, 76. We therefore conclude that, by providing differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.[*]

Reversed.

MR. JUSTICE STEWART concurs in the judgment, agreeing that the statutes before us work an invidious discrimination in violation of the Constitution. *Reed* v. *Reed*, 404 U. S. 71.

MR. JUSTICE REHNQUIST dissents for the reasons stated by Judge Rives in his opinion for the District Court, *Frontiero* v. *Laird*, 341 F. Supp. 201 (1972).

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, concurring in the judgment.

I agree that the challenged statutes constitute an unconstitutional discrimination against service women in [illegible] statutory definition of "dependent" to these statutes, it appears that, in the "median" family, the ratio of a wife member's total personal expenses to her husband's is 46% or about 31% of the total family income, in order to qualify as a "dependent."

[*] In order to provide female members of the uniformed services in order to establish a common-sense pattern which would permit either personal family entitlement. *See* n. 5, *supra*, and accompanying text. The conclusion in the text applies only to those statutes which compel a female member to prove the dependency of her spouse. *See Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972); *Levy* v. *Louisiana*, 391 U. S. 68 (1968); *Mathews* v. *Lucas*, — U. S. —, 96 S. Ct. 2755 (1976). *See also* 5 U. S. C. § 8

violation of the Due Process Clause of the Fifth Amendment, but I cannot join the opinion of MR. JUSTICE BRENNAN, which would hold that all classifications based upon sex, "like classifications based upon race, alienage, and national origin," are "inherently suspect and must therefore be subjected to strict judicial scrutiny." *Supra*, at 5. It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding. *Reed* v. *Reed*, 404 U. S. 71 (1971), which abundantly supports our decision today, did not subject to the normally limited group of classifications which are inherently suspect. In my view, we can and should decide this case on the authority of *Reed* and reserve for the future any expansion of its rationale.

There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to preempt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

There are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.

JOSEPH J. LEVIN JR., Montgomery, Ala. (MELVIN L. WULF, JR., with him on the briefs) for appellants, and ROBERT GINSBURG, New York, N.Y. (MELVIN L. WULF, DEBORA FERGUS EASTMAN, and MARC FEIGEN FASTEAU, [illegible] on the briefs) for appellants and [illegible] for appellees. SOLICITOR General ROBERT H. BORK, Assistant Attorney General HAROLD LEVENTHAL, Deputy Solicitor General MICHAEL H. GOTTESMAN, and Assistant to the Solicitor General WALTER H. FLEMMING and ROBERT S. GREENSPAN, Justice Dept. attorneys, with him on the brief) for appellees.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

MARSHA B. HEALY, ET AL.	CIVIL ACTION
VERSUS	NO. 73-698
HON. EDWIN EDWARDS, ET AL.	SECTION "C"

MEMORANDUM FOR DEFENDANTS WITH RESPECT TO DEFINITION OF THE CLASSES AND ABSENCE OF NOTICE REQUIREMENT

A. Class Definition

With respect to the definition of the classes which plaintiffs purport to represent, defendants recognize and acquiesce to the validity of the female class which is composed of all female residents of the Twenty-Second Judicial District who are eligible for jury service under Article 401 of the Louisiana Code of Criminal Procedure, but who are exempted from such service under Article 402.

Therefore, because the relief requested by this class will, if granted, dispose of the issues and relief prayed for by the male class and the female sub-class, defendants believe that no useful purpose would be served by requiring further definition of the class.

B. Class Notice

With respect to whether or not notice to the members of the class is required, defendants agree with plaintiffs, for the reasons set forth in their brief, that notice in this case would serve no purpose because withdrawl from the class is not an option for class members and the relief requested is for declaratory judgment and not money damages. Therefore, defendants do not object to it

dispensing with notice requirements to the class members in this particular case.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL

WARREN E. MOULEDOUX
FIRST ASSISTANT ATTORNEY GENERAL

ROBERT L. DANNER
SPECIAL COUNSEL

Dale C Wilks

DALE C. WILKS
SPECIAL COUNSEL

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this 8th day of June, 1973

Dale C Wilks

JUN 12 8 51 AM '73
BENJAMIN M. REISS
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

MARSHA B. HEALY, ET AL. PLAINTIFFS	*	CIVIL ACTION
VERSUS	*	NO. 73-688
HON. EDWIN EDWARDS, ET AL. DEFENDANTS	*	SECTION "C"

* * * * * * *

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT.

Plaintiffs, throughout their memorandum, continuously refer to the "exemption" from jury service given to women under Louisiana law as an "exclusion". This random interchanging of terms is not only misleading but also based on the erroneous supposition that "exemption" and "exclusion" have one in the same meaning. The "exemption" from jury service which is provided for in Article 402 of the Code of Criminal Procedure, LSA-R.S. 13:3055 and Section 41 of Article 7 of the Louisiana Constitution of 1921 does not in any way exclude or deprive women of their right to serve on juries. This assertion is also supported by the fact that the law specifically prohibits discrimination in the drawing and selection of juries on the basis of sex as set forth in LSA-R.S. 13:3056:

> "In the drawing and selection of juries in civil cases no distinction shall be made against any person on account of sex when such person meets the requirements set forth in R.S. 13:3055."

Plaintiffs cite Carter v. Jury Commission, 396 US 320 (1969), Peters v. Kiff, 407 US 493 (1972) and Apodaca v. Oregon, 406 US 404 (1972) in which cases the "exclusion" of identifiable segments

of the community from jury panels and from the juries ultimately drawn from those panels was held to be a violation of equal protection both for the litigants tried by discriminatorily selected juries and for members of the group discriminated against. These cases, however, involved the "exclusion" of certain groups through discriminatory methods which prevented persons from exercising their right to serve on juries. This is not the case with the "exemption" granted to women under Louisiana law, since those women who want to serve on juries are free to register with the clerk of court and thereby subject themselves to jury duty. Hence, the difference in effect between the Louisiana "exemption" and the "exclusion" of identifiable groups as noted in Carter, Kiff and Apodaca, cited supra, is obvious - the Louisiana exemption does not prohibit any woman who wants to from participating in jury duty. (emphasis supplied).

Plaintiffs rely strongly on Reed v. Reed, 404 US 71, and Fontiniero v. Richardson, 41 Law Week 4609, to support the assertion that dissimilar treatment for men and women who are similarly situated is unconstitutional. However, the Court in Reed v. Reed, supra, recognized that dissimilar treatment of different classes of persons is not unconstitutional if the "classification is reasonable, not arbitrary, and rests on some ground of difference having a fair and substantial relation to the object of the legislation". Also, in Fontiniero v Richardson, supra, the Court recognized that dissimilar treatment for men and women could be constitutional even applying the test of "strict judicial scrutiny":

> "In order to satisfy the demands of strict judicial scrutiny, the Government must demonstrate, for example, that it is actually cheaper to grant increased benefits with respect to all male members, than it is to

"determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependency requirement. Here, however, there is substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits."

In the instant case, even applying the test of"strict judicial scrutiny" , the exemption from jury duty which is granted to women under the Louisiana law is "reasonable and rests on some ground of difference having a fair and substantial relation to the object of the legislation", Reed v. Reed, 404 US 71. This conclusion is supported by the Supreme Court's ruling in Hoyt v. Florida, 368 US 57, 82 S.Ct. 159 (1961), which recognized the "exemption" of women from jury service not to be an "exclusion" but rather "a privilege"... "based upon a reasonable classification...". In view of the above, defendants maintain that plaintiffs have failed to state a claim upon which relief can be granted and consequently their complaint should be dismissed.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL

WARREN E. MOULEDOUX
FIRST ASSISTANT ATTORNEY GENERAL

ROBERT L. DANNER
SPECIAL COUNSEL

Dale C. Wilks

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2-3-4 Loyola Building
234 Loyola Avenue
New Orleans, La. 70112
527-8375

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this 6th day of June, 1973

Dale C. Wilks

WEST DISTRICT COURT Jury demand date: 73-688 4

Doc.

TITLE OF CASE	ATTORNEYS
~SHA B. HEALY, ZANNE D. HILL, ROLYN HALL, NDA WALZ, ARLES W. HILL, RRY A. WALZ and HN J. HEALY	For plaintiff: William E. Rittenberg Debra Millenson George Strickler American Civil Liberties Union of La. 606 Common St. N.O.,LA. 522-0617 - 525-4361 Ruth Bader Ginsburg American Civil Liberties Union 22 East 40th St. N.Y., N.Y. 10016 SYLVIA ROBERTS NOW LEGAL DEFENSE AND EDUCATION FUND P.O. Box 3081 Baton Rouge, La.
N. EDWIN EDWARDS, GOVERNOR OF LA., N. THOMAS W. TANNER, N. WALLACE A. EDWARDS, N. HILLARY J. CRAIN, Judges of the nd Judicial District Court, FUSSELL, B. CROW, LLY W. WEAVER, BERT FITZHORRIS, CTOR GRANTHAM: all defts are sued th in their official and individual acities	For defendant: Warren E. Houledoux First Asst. Atty. General State Capitol Baton Rouge, La. Dale C. Wilks Robert L. Danner, Jr. 234 Loyola Ave. Room 815 N.O., LA.

WED., JUNE 13, 1973 9:00 AM

MTN OF DEFTS TO DISMISS -
PLTFS CROSS MOTION FOR SUMMARY JUDGMENT

These motions are to be decided by the Three Judge Court.

MTN TO INTERVENE BY SHIRLEY ANN ROBINSON AND JENNY LEE SMITH BAGGETT

Granted. Mr. George Strickler to prepare order.

Counsel to file a stipulation by 5 PM on June 22 or hearing set for July 6 will be cancelled. A brief pre-trial order is to be filed by June 22, 1973.

JUN 20 1973

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, et al.,	)	
	)	CIVIL ACTION
Plaintiffs	)	
	)	NO. 73-688
v.	)	
	)	SECTION "C"
HON. EDWIN EDWARDS et al.,	)	
	)	
Defendants.	)	
	)	
	)	
	)	
	)	

PRE-TRIAL ORDER

Jurisdiction

This Court for jurisdiction of this action pursuant to 28 U. S. C. § 1343 (3) and (4).

Class Action

This is a class action within the terms of Rule 23(b) (2) of the Federal Rules of Civil Procedure. The two classes and one sub class are defined in paragraph 5 of the Amended Complaint and Complaint in Intervention.

Pending Motions

Defendants have moved to dismiss the action. Plaintiffs have moved for summary judgment.

Issues of Fact

There are no contested issues of fact. The parties have entered into a stipulation of facts for submission to the Court.

Issues of Law

(a) Plaintiffs' and Plaintiff's-intervenors' Formulation:

1. Whether the plaintiffs and plaintiffs-intervenors have standing to prosecute this action.

2. Whether the differential treatment of [illegible]

women compelled by Article 402 of the Louisiana Code of Criminal Procedure, Louisiana Revised Statutes, Title 13 Article 3055, and Section 41 of Article 7 of the Louisiana Constitution constitutes invidious discrimination in violation of the Fourteenth Amendment to the United States Constitution.

(b) Defendants' Formulation

1. Does the sub-class of male plaintiffs suffer immediate injury or the threat of immediate injury to give them standing to attack the constitutionality of the mandatory jury service, as being violative of the due process and equal protection clauses of the 14th Amendment to the United States Constitution.

2. Does the "exemption" from mandatory jury service which is given to women under Louisiana law constitute an 'exclusion' within the meaning fo the Supreme Court's ruling in Carter v. Jury Commissioners, 396 U. S. 320 (1969), so as to give plaintiffs standing to allege a deprivation of rights guaranteed under the Sixth Amendment to the United States Constitution.

3. Is the "exemption" from mandatory jury service which is given to women under Louisiana law a dissimilar treatment of different classes of persons which is reasonable, not arbitrary and rests on some ground of difference having a fair and substantial relation to the object of the legislation so as to withstand the test of "strict judicial scrutiny" and not violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

UNITED STATES DISTRICT JUDGE

Counsel for Plaintiffs and Plaintiffs-Intervenors

Counsel for Defendants

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Jun 25 1 37 PM '73
BENJAMIN W. REISCH
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

MARSHA B. HEALY, ET AL.	•	CIVIL ACTION
Plaintiffs	•	NO. 73-688
versus	•	SECTION "C"
HON. EDWIN EDWARDS, et al.	•	
Defendants	•	

STIPULATION OF FACTS

Plaintiffs, plaintiffs-intervenors, and all defendants in the above cause, through their respective counsel, do hereby stipulate and agree, subject to objection by any party as to relevance, competency and materiality, as follows:

1.) The Jury Commissions of St. Tammany Parish and Washington Parish, whose members are defendants herein, comply with all provisions of Article 402 of the Louisiana Code of Criminal Procedure, Louisiana Revised Statute, Title 13, Article 3055 and Article 7, Section 41 of the Louisiana Constitution of 1921. Female residents of St. Tammany and Washington Parishes who are eligible for jury service under the standards of Article 401 of the Louisiana Code of of Criminal Procedure are not included in the general venires or jury wheels of the parishes unless they individually make written requests to their respective

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Jury Commissions to be so included.

2.) Each of the female plaintiffs and female plaintiffs-intervenors is eligible for jury service under the standards of Article 401 of the Louisiana Code of Criminal Procedure and Louisiana Revised Statutes, Title 13, Section 3041. None have filed requests to be placed in the general venires of their respective parishes and none have been so included.

3.) Plaintiff-intervenor Baggett has filed a civil damage action in the Twenty-Second Judicial District Court in Washington Parish and has requested a jury trial. Plaintiff-intervenor Robinson is preparing to file a civil damage action in St. Tammany Parish. She will request a jury trial.

4.) Each of the male plaintiffs is eligible for jury service under the standards of Article 401 of the Louisiana Code of Criminal Procedure and Louisiana Revised Statutes, Title 13, Section 3041.

5.) Fifty-three percent (53%) of the population of persons eligible for jury service in St. Tammany Parish and in Washington Parish is female.

6.) In St. Tammany Parish no more than ten percent (10%) of the persons in the general venire or jury wheel are female. In recent years the following jury drawings have been made:

> November 22, 1971. Fifty (50) names for Grand Jury to serve first six months of 1972. Two (2) women drawn.
>
> December 8, 1971. Two Hundred (200) names for jury term beginning January 10, 1972. One (1) woman drawn.
>
> January 7, 1972. Two hundred (200) names for jury term beginning March 13, 1972. No women drawn.
>
> February 28, 1972. One hundred (100) names for jury term beginning April 3, 1972. Two (2) women drawn.
>
> February 28, 1972. Two hundred (200) names for jury term beginning April 13, 1972. One (1) woman drawn.

March 17, 1972. Two hundred (200) names for jury term of May 8, 1972. Two (2) women drawn.

April 11, 1972. Seventy-five (75) names for jury term of April 13, 1972. No women drawn.

May 22, 1972. One hundred-fifty (150) names for jury term of July 10, 1972. No women drawn.

June 15, 1972. Fifty (50) names for Grand Jury term for next six months. No women drawn.

July 26, 1972. Two hundred (200) names for jury term of September 11, 1972. Two (2) women drawn.

August 25, 1972. Two Hundred (200) names for term of October 9, 1972. Two (2) women drawn.

September 28, 1972. Two hundred (200) names for jury term of November 13, 1972. Two (2) women drawn.

November 3, 1972. Seventy-five (75) names for jury term of December 18, 1972. No women drawn.

December 4, 1972. Fifty (50) names for Grand Jury term of next six months. One (1) women drawn.

7.) If called to testify, Dewaine Seal, the Clerk of Court of Washington Parish, would testify that to his knowledge, no more than two women in Washington Parish have requested that they be made eligible for jury service and that only on one occasion has a woman been included in a petit jury venire.

8.) The discrepancies between the percentages of women in the populations of persons eligible for jury service in St. Tammany and Washington Parishes and the percentages of women actually included in the venires of these parishes is the result of the enforcement of Article 402 of the Louisiana Code of Criminal Procedure, Louisiana Revised Statutes, Title 13, Article 3055, and Article 7, Section 41 of the Louisiana Constitution of 1921.

COUNSEL FOR PLAINTIFFS AND PLAINTIFFS-INTERVENORS

Dated: June , 1973

COUNSEL FOR DEFENDANTS

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY, on behalf of themselves and other similarly situated,	)	
Plaintiffs,	)	
SHIRLEY ANN ROBINSON and JENNY LEE SMITH BAGGETT, on behalf of themselves and others similarly situated,	)	CIVIL ACTION
Applicants for Intervention,	)	NO. 73-688
versus	)	SECTION "C"
EDWIN EDWARDS, Governor of Louisiana THOMAS W. TANNER, WALLACE A. EDWARDS and HILLARY J. CRAIN, Judges of the Twenty Second Judicial District, DELOS FUSSELL, A. B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM, Members of the Jury Commission of St. Tammany Parish; JOHN WOOD, MARVIN WILLIAMS, HAROLD FOIL and DEWAINE SEAL, Members of the Jury Commission of Washington Parish,	)	
Defendants	)	

ORDER

Upon consideration of the Motion to Intervene filed by Shirley Ann Robinson and Jenny Lee Smith Baggett and the Motion to Join Parties Defendant and to Amend Complaint filed by both the applicants for intervention and the

original plaintiffs and there being no opposition to these motions by the defendants,

IT IS HEREBY ORDERED that Jenny Lee Smith Baggett and Shirley Ann Robinson be allowed to intervene in this action as parties plaintiff and that John Wood, Marvin Williams, Harold Foil, Preston Varnado and Dewaine Seal, all members of the Jury Commission of Washington Parish, be joined as parties defendant.

IT IS FURTHER ORDERED that plaintiffs and plaintiff intervenors be allowed to file their Amended Complaint and Complaint In Intervention in this action.

The Court has determinted that this is a proper class action and that the two classes and one sub-class as described in the Amended Compalint and Complaint in Intervention are properly defined. Since the classes and sub-class meet the requirements of Rule 23(b)(2) of the Federal Rules and since no party has suggested any reason why notice should be given to the class members, such notice will not be required.

UNITED STATES DISTRICT JUDGE

EASTERN DISTRICT OF LOUISIANA
AUG 31 1973
FILED
BENJAMIN W. REISCH
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY, Plaintiffs versus HON. EDWIN EDWARDS, GOVERNOR OF LA., HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL, A.B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM; all defendants are sued both in their official and individual capacities, Defendants	CIVIL ACTION NO. 73-688 SECTION "C" (THREE-JUDGE COURT CASE)

George Strickler, Esq.
New Orleans, La.
Ruth Bader Ginsburg, Atty.
New York, New York
Sylvia Roberts, Atty.
Baton Rouge, La.
Attorneys for Plaintiffs

Warren E. Mouledoux, Esq.
Baton Rouge, La.
Dale C. Wilks, Esq.
Robert L. Danner, Jr., Esq.
New Orleans, La.
Attorneys for Defendants

RUBIN, District Judge:

The Louisiana Constitution[1] and statutes[2] exempt women from service on juries unless they file a written declaration of their desire to serve. This benign dispensation has resulted in jury panels that, in the parishes here involved, have never included more than five percent females, and frequently less. The plaintiffs in this class action seek a declaration that the exemption provisions violate the rights of the class to Equal Protection and Due Process of the Law, and an injunction against

DATE OF ENTRY AUG 31 1973

continued enforcement of these laws.

I.

Three separate classes of suitors join in the attack: (a) one comprises all females in the named parishes; these women contend that both their right to serve on juries and their opportunity, should occasion arise, to litigate before juries is abridged; (b) another comprises all males in those parishes; these men contend that they are subject to more onerous jury service because similarly situated females are not required to serve; and (c) the third, the intervening class, is composed of female litigants in civil cases in state court; these contend they are deprived of a jury of their peers.

Because the jurisdiction of federal courts is limited by the Constitution to "Cases" and "Controversies," Art. III, Sec. 2, U.S. Constitution, they may not issue merely advisory opinions concerning the constitutionality of legislation, federal or state. Indeed the power to declare a statute unconstitutional is deduced from the necessity of determining its validity in order to decide a particular case or controversy.

A case, in the constitutional sense, must present a real controversy. A statute may be attacked as unconstitutional only by someone who has sustained or is in immediate danger of sustaining some direct injury from its enforcement. It does not suffice to show that one is injured merely as a member of the body politic. Frothingham v. Mellon, 1923, 262 U.S. 447, 43 S.Ct. 597.

This is what is meant by standing to sue, the requirement that, to justify attack on legislation, a litigant be able to show injury by the statute, "for it is this requirement that gives a litigant a direct stake in the controversy and prevents the judicial process from becoming no more than a vehicle for the vindication of value interests of concerned bystanders." United States v. SCRAP, 1973, ___U.S.___, ___S.Ct.___ (slip op. at p.16).

In SCRAP, only a few weeks ago, the Supreme Court focused

the light of the decisions on standing: the test is whether the litigant can show "injury in fact," that he has been or will in fact be "perceptibly harmed." The litigants in SCRAP met that test by alleging a "specific and perceptible harm that distinguished them from other citizens."

It is not necessary that the harm be great or substantial; it suffices that it be small, indeed a trifle, so long as it distinguishes a person with a direct stake in the outcome of the litigation from a person with a mere interest in the problem. SCRAP, ___U.S. at ___, ___ S.Ct. at ___, and note 14 (slip op. at p. 18).

We pretermit the question whether all females as a class suffer a specific and perceptible harm when required to write a letter in order to serve on juries or whether the greater burden of jury service imposed on males by the virtual exemption of females from jury duty is a palpable enough trifle. Together these two classes -- all women and all men -- comprise the entire adult citizenry, and they allege in effect a harm to the body politic. It may be questioned whether, if the entire citizenry is aggrieved by official action, they may seek judicial relief instead of following the political route accorded by the democratic process.

But there is a class of persons joined in prosecuting this suit who have both a direct and a personal interest: the intervenors representing women who have suits pending in state court.

Litigants have standing to allege the unconstitutionality of a statute or practice that potentially denies their right to Due Process of Law by interfering with fair jury selection.[3/] The intervenors' standing to sue gives justiciability to the entire case. "[A] court has discretion to treat the pleading of an intervenor as a separate action in order that it might adjudicate the claims raised by the intervenor." Fuller v. Volk, 3 Cir. 1965, 351 F.2d 323, 328-329. Accord: Atkins v. State Board of Education, 4 Cir. 1969, 418 F.2d 874, 876; Hackner v. Guaranty Trust Co., 2

Cir. 1941, 117 F.2d 95, 98.

The intervenors represent, through Ms. Baggett, females actually engaged in litigation in state courts. To deprive them of a jury comprising a fair cross section of the population, including females, is a claim of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Golden v. Zwickler, 1969, 394 U.S. 103, 89 S.Ct. 956, 959. "Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection." Carter v. Jury Commission, 1970, 396 U.S. 320, 90 S.Ct. 518, 523.

It is unnecessary to probe whether these litigants would have standing to challenge the provisions of the Louisiana Code of Criminal Procedure for jury selection in criminal cases, were that issue presented alone. Their right to challenge the Louisiana constitutional provision having been established, the issue of the entire scope of jury selection in all kinds of cases appears to be inescapably involved.

II.

Only twelve years ago, in Hoyt v. Florida, 1961, 368 U.S. 57, 82 S.Ct. 159, the Supreme Court upheld the constitutionality of a Florida statute almost identical to the challenged provisions of the Louisiana Constitution. That decision was followed in Leighton v. Goodman, S.D.N.Y. 1970, 311 F.Supp. 1181, and United States v. Caci, 2d Cir. 1968, 401 F.2d 664. Hoyt rested on the finding that Florida's statute was based on a reasonable classification and the venerable dictum in Strauder v. West Virginia, 1879, 100 U.S. 303, 310, unchallenged for eighty years, that a State may constitutionally confine jury duty "to males."

But the ground on which Strauder stood was eroded by Reed v. Reed, 1971, 404 U.S. 71, 92 S.Ct. 251, and crevassed by Frontiero v. Richardson, 1973, ___U.S.___, 93 S.Ct. 1764. In Reed the court held that an Idaho statute violated the Equal Protection Clause in providing that, when two individuals are

otherwise equally entitled to appointment as administrator of an estate, the male applicant must be preferred to the female. By according different treatment to applicants on the basis of their sex, the statute "establishes a classification subject to scrutiny under the Equal Protection Clause." Reed, supra, 92 S.Ct. at 253.

"The Equal Protection Clause...[denies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." (Emphasis supplied.) Id. at 253-54. By ignoring the individual qualifications of particular applicants, the challenged statute provided "dissimilar treatment for men and women who are thus similarly situated." Id. at 254.

While only four justices were willing in Frontiero to conclude that classifications based upon sex "are inherently suspect," seven justices agreed that it was unconstitutional for Congress, solely for administrative convenience, to deny a female member of the uniformed services the right to claim her spouse as a dependent for the purposes of obtaining increased quarters allowances and medical and dental benefits without proving his actual dependency, while according this right to males with respect to female dependency. Three concurring justices found that Reed "abundantly supports our decision today." ___U.S. at ___, 93 S.Ct. at 1773.

The minimum requirement of Equal Protection, then is that dissimilar treatment may no longer constitutionally be provided for men and women who are similarly situated with respect to the objectives of the legislation. The objective of the state legislation here attacked is the method of selecting juries. The state does not contend that there is any difference between males and females with respect to their qualifications or competency as jurors. Nor could it do so, for women's full competency is

demonstrated by their complete acceptability if they volunteer. Hence the state constitutional provision patently fails to meet the requirements of Equal Protection for women as potential jurors. Female litigants having standing to sue can properly raise this issue which applies to women as a class.

Female litigants are also denied Equal Protection by being compelled to have their cases decided by juries composed entirely or predominantly of males. If this were proper sauce for geese, there might be gander gravy too: states might with equal logic grant jury exemptions only to all male wage earners who do not ask to serve, with the result that litigants, male and female, would be compelled in practice to submit to verdicts by predominantly female juries. Males might then properly question whether they were being afforded Equal Protection of the laws.[4/]

The Nineteenth Amendment brought women the right to vote, and freed them from strictures that had 43 years earlier been lifted from those males who had formerly been denied the franchise because of race. In the half century since then, women have moved in increasing numbers from hearthside into the world of work and business and politics. Forty percent of the American work force is female.[5/] Over 57% of all American women between the ages of 20 and 24, and 45% of those between 25 and 34, are in the wage earning work force.[6/]

Louisiana's continued subscription to the notion that women must be shielded from jury duty, unless they choose to volunteer, results in juries that are predominantly male. Whether favorable or unfavorable to females, the sexual prejudice implicit in the thesis that women are entitled to an exemption not accorded men imparts to the jury a potential prejudice, be it ever so subtle or intangible, that is real and meaningful. Compare Justice Murphy's dissenting opinion in Fay v. N.Y., 1947, 332 U.S. 261, 300, 67 S.Ct. 1613, 1633.

III.

Litigants, male or female, have a constitutional right to trial by an impartial jury drawn from a cross section of the community. The "American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." Thiel v. Southern Pacific Co., 1946, 328 U.S. 217, 220, 66 S.Ct. 984, 985. Since this is inherent in Due Process of Law, the denial may be challenged not only by a litigant who is a member of a class excluded from representation, 7/ but even by one whose right to an impartially selected jury is biased by disproportionate partiality to a class that includes him. Peters v. Kiff, 1972, ___U.S.___, 92 S.Ct. 2163.

Peters held that a white defendant might challenge discrimination against black jurors. The opinion illuminates that the arbitrary exclusion of any well-defined class of citizens offends a number of related constitutional values:

-- the members of the class excluded are denied Equal protection:

-- potential jurors are denied the "privilege of participating equally...in the administration of justice;" and

-- "it stigmatizes the whole class,[of those excluded] even those who do not wish to participate, by declaring them unfit for jury service and thereby putting 'a brand upon them, affixed by law, an assertion of their inferiority;'"

-- "exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross-section of the community." Id. at 2167.

The court concluded:

> But the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases.
>
> * * * * *
>
> Moreover, we are unwilling to make the assumption that the exclusion of Negroes has a relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented. Id. at 2169.

Females, as individuals, bring to juries "qualities of human nature and varieties of human experience," entirely different from those of males, and a diversity of temperament, among themselves, completely heterogeneous. Their absence from jury panels is significant not because all women react alike, but because they contribute a distinctive medley of views influenced by differences in biology, cultural impact and life experience, indispensable if the jury is to comprise a cross-section of the community.

"It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community," the Supreme Court declared in Smith v. Texas, 1941, 311 U.S. 128, 130, 61 S.Ct. 164, 165, referring to the exclusion of jurors based on race. In like tenor, referring to the exclusion of wage earners, in Thiel v. Southern Pacific Company, 1946, 328 U.S. 217, 223, 66 S.Ct. 987, the Court commented that the excluded class "constitute[s] a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system."

A jury panel that is almost entirely male, whether because females are excluded or because they serve only if they volunteer and almost none step forward, cannot be "truly representative of the community," and women's absence does "violence to the democratic nature of the jury system." The jury must not merely mirror the American male, just as it must not reflect the views of only one race or one stratum of society.

Due Process insists upon the integrity of the jury system. There may be no constitutional requirement that a state proceed by grand jury indictment, Hurtado v. California, 1884, 110 U.S. 516, 4 S.Ct. 111. But when prosecution is initiated by indictment, the state may not impose a discriminatory pattern in

selecting the jury. Hill v. Texas, 1942, 316 U.S. 400, 62 S.Ct. 1159.

Similarly, it is unnecessary to search the limits of the Constitution for a right to jury trial in civil cases. "Once the State chooses to provide grand and petit juries, whether or not constitutionally required to do so, it must hew to federal constitutional criteria in ensuring that the selection of membership is free from racial bias," Carter v. Jury Commission of Green County, 1970, 396 U.S. 320, 330, 90 S.Ct. 518, 523-24, and, we add, every other type of unconstitutional discrimination. [8]

IV.

Nor must this court await the day when the Supreme Court itself has occasion to reconsider and overrule Hoyt.

"This Court, of course, must follow the Supreme Court, but there are occasional situations in which subsequent Supreme Court opinions have so eroded an older case, without explicitly overruling it, as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new lead from the Supreme Court to a conclusion inconsistent with an older Supreme Court case." Rowe v. Peyton, 4 Cir. 1967, 383 F.2d 709, 714, affirmed 391 U.S. 54.

This also was the view of the Second Circuit, in Perkins v. Endicott Johnson Corp., 2 Cir. 1942, 128 F.2d 208, where Judge Frank pointed out that, for lower courts to continue to hold stubbornly to barren precedent would stultify them and unnecessarily burden the Supreme Court. See also In re Korman, 7 Cir. 1971, 449 F.2d 32, reversed by the Supreme Court because the Seventh Circuit incorrectly concluded that earlier doctrine had been discarded, 92 S.Ct. 2055; Browder v. Gayle, M.D. Ala. 1956, 142 F.Supp. 707, affirmed 352 U.S. 903, and cases cited therein; contra Ward v. Luttrell, E.D. La. 1968, 292 F.Supp. 162; Fishkin v. United States Civil Service Commission, N.D. Calif., 1969, 309 F.Supp. 40, appeal dismissed, 1970, 396 U.S. 278, 90 S.Ct. 557; see Comment (1941) 50 Yale Law Journal 1448, 1450.

When today's vibrant principle is obviously inconflict with yesterday's sterile precedent, trial courts need not follow the outgrown dogma. Hence we consider that Hoyt is no longer binding.

V.

Because the Louisiana Constitution denies all litigants Due Process of Law and deprives female litigants of their right to Equal Protection by according an exemption from jury service to women on a basis different from that available to men under substantially similar circumstances, and on the basis of a sexual criterion that is wholly unrelated to the objectives of jury service, we declare it and the statutes enacted pursuant to it unconstitutional.

John Minor Wisdom
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT JUDGE

R. Beer
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
August 31, 1973.

1/ La. Const. Art. VII, §41.

2/ Under the authority of the state constitutional provision, separate statutes allow the exemption in civil and in criminal cases: LSA-R.S. 13:3055; La. Code of Criminal Procedure, Art. 402.

3/ "[A] plaintiff need not invariably wait until he has been successfully prosecuted, dismissed, denied a license, or otherwise directly subjected to the force of a law or policy before he may challenge it in court." National Student Association v. Hershey, D.C. Cir. 1969, 412 F.2d 1103, 1110.

4/ Ballard v. United States, 1946, 329 U.S. 187, 67 S.Ct. 261, a federal criminal case tried in California, where no women were included on the panel of grand and petit jurors, is not directly applicable. But the court found the "purposeful and systematic exclusion" of women invalid, and observed:

> "It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the

same as those which influence the action of men--personality, background, economic status--and not sex. Yet is is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The trutn is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables.

To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded." 329 U.S. at 193, 67 S.Ct. at 264.

5/ See Lexcen, The Equal Rights Amendment, 31 Federal Bar Journal 247, 250-51; U.S. Dept. of Labor, Women's Bureau, Underutilization of Women Workers, 1971 (revised), p. 1.

6/ U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States, 1972. Table No. 341, at p. 217.

7/ Whitus v. Georgia, 1967, 385 U.S. 545, 87 S.Ct. 643; Avery v. Georgia, 1953, 345 U.S. 559, 73 S.Ct. 891; Norris v. Alabama, 1935, 294 U.S. 587, 55 S.Ct. 579; Carter v. Texas, 1900, 177 U.S. 442; Strauder v. West Virginia, 1879, 100 U.S. 303 (black defendants challenging discrimination against black jurors).

8/ The Supreme Court has considered the requirements of the Constitution with respect to the manner of selecting juries in a number of cases. It would be mere pedantry to review them all. But the landmarks stand high and clear.

In Glasser v. United States, 1942, 315 U.S. 60, 85-86, 62 S.Ct. 457, 471-472, Justice Murphy wrote, with respect to the selection of federal juries:

"Lest the right of trial by jury be nullified by the improper constitution of juries, the notion of what a proper jury is has become inextricably intertwined with the idea of jury trial. When the original Constitution provided only that 'The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury;' the people and their representatives, leaving nothing to chance, were quick to implement that guarantee by the adoption of the Sixth Amendment which provides that the jury must be impartial.

* * * * *

But even as jury trial, which was a privilege at common law, has become a right with us, so also, whatever limitations were inherent in the historical common law concept of the jury as a body of one's peers do not prevail in this country. Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly

> representative of the community.'" Smith v. Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84.

In that case the federal jury commissioner had included only those women whose names were on a list supplied by the Illinois League of Women Voters, and prepared exclusively from its membership. The court found this to be unconstitutional. The officials charged with choosing federal jurors,

> "must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties." Ibid.

See Ballard v. United States, 1946, 329 U.S. 187, 67 S.Ct. 261 (women systematically excluded from grand jury); Thiel v. Southern Pacific Co., 1946, 328 U.S. 217, 66 S.Ct. 984 (all persons who worked for daily wage intentionally excluded from jury lists); Labat v. Bennett, 5 Cir. 1966, 365 F.2d 698 (wage earners systematically excluded from jury); State v. Madison, 1965, 240 Md. 265, 213 A.2d 880 (non-theists excluded from jury); Simmons v. State, Fla. 1966, 182 So.2d 442 (common laborers systematically excluded).

Compare Fay v. People of the State of New York, 1947, 332 U.S. 261, 67 S.Ct. 1613, where the court rejected a challenge to state jury selection methods that resulted in blue ribbon juries as not violative of equal protection or due process, distinguishing the cases involving exclusion based on race as based on violation of federal legislation, 8 U.S.C.A. §44, designed to enforce the Fourteenth Amendment.

EASTERN DISTRICT OF LOUISIANA
AUG 31 1973
FILED
BENJAMIN W. REISCH
CLERK

96

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY,
SUZANNE D. HILL,
CAROLYN HALL,
LINDA WALZ,
CHARLES W. HILL,
JERRY A. WALZ and
JOHN J. HEALY

VERSUS

HON. EDWIN EDWARDS, GOVERNOR
OF LA.,
HON. THOMAS W. TANNER,
HON. WALLACE A. EDWARDS,
HON. HILLARY J. CRAIN, Judges
of the 22nd Judicial District
Court,
DELOS FUSSELL,
A. B. CROW,
BILLY W. WEAVER,
ROBERT FITZMORRIS,
VICTOR GRANTHAM; all defendants
are sued both in their official
and individual capacities

CIVIL ACTION

NO. 73-688

SECTION "C"

JUDGMENT

This matter came on for hearing on a previous day, and for the written reasons on file herein,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs, Marsha B. Healy, Suzanne D. Hill, Carolyn Hall, Linda Walz, Charles W. Hill, Jerry A. Walz and John J. Healy, and against defendants, Hon. Edwin Edwards, Governor of La., Hon. Thomas W. Tanner, Hon. Wallace A. Edwards, Hon. Hillary J. Crain, of the 22nd Judicial District Court, Delos Fussell, A. B. Crow, Billy W. Weaver, Robert Fitzmorris and Victor Grantham, declaring the Louisiana Jury Selection System whereby women may not serve on juries without filing a written declaration of their desire to do so unconstitutional.

Dated at New Orleans, Louisiana, this 31st day of August, 1973.

BENJAMIN W. REISCH, CLERK

By: Nelson B. Jones
NELSON B. JONES, CHIEF DEPUTY CLERK

APPROVED AS TO FORM:

UNITED STATES DISTRICT JUDGE

FEE
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X CHARGES
JDGE

U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
SEP 6 1973
FILED
BENJAMIN W. REISCH
CLERK

MINUTE ENTRY
SEPTEMBER 4, 1973
RUBIN, J.

MARSHA B. HEALY, ET AL

versus

HON. EDWIN EDWARDS, GOVERNOR
OF LOUISIANA, ET AL

CIVIL ACTION

NO. 73-689

SECTION "C"

(THREE-JUDGE
COURT CASE)

***

The August 31, 1973 opinion is amended as follows:

Defendants are hereby enjoined from enforcing the constitutional and statutory provisions declared to be unconstitutional.

John Minor Wisdom
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT JUDGE

RB Beal
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SEP 10 9 59 AM '73
CLERK

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY,	)	
Plaintiffs	)	CIVIL ACTION
versus	)	NO. 73-688
HON. EDWIN EDWARDS, GOVERNOR OF LOUISIANA, HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL, A.B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM: all defendants are sued both in their official and individual capacities,	)	SECTION "C" (THREE-JUDGE COURT CASE)
Defendants	)	

MOTION TO STAY EXECUTION OF JUDGMENT PENDING APPEAL

Defendants, through the Honorable William J. Guste, Jr. move this court pursuant to Rule 62(C) of the Federal Rules of Civil Procedure to order a stay of the execution of judgment rendered in this action on August 31, 1973, pending said defendants' appeal from said judgment to the Supreme Court of the United States; and, as grounds for said motion, the defendants say:

1. That the defendants will suffer irreparable injury in the loss of time of its officers, agents, and employees and expenses to be incurred by the defendants in compiling respective lists of all the eligible women in Louisiana for jury service as ordered by the Court's said judgment, in the event that said judgment is reversed upon the defendants' said appeal therefrom;

2. That the defendants will suffer irreparable injuries in complying with the injunction decreed by the Court's final judgment, in the event said judgment is reversed on the defendant's said appeal therefrom.

WHEREFORE, defendants pray that this Court order a stay of the execution of its judgment rendered in this action on August 31, 1973, pending defendant's appeal to the Supreme Court of the United States.

RESPECTFULLY SUBMITTED:

WILLIAM J. GUSTE, JR.
Attorney General

Warren E. Mouledoux

WARREN E. MOULEDOUX
First Assistant Attorney General

Robert L. Danner, Jr.

ROBERT L. DANNER, JR.
Special Counsel
2-3-4 Loyola Bldg. - 7th Floor
234 Loyola Avenue
New Orleans, Louisiana 70112
527-8375

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this 5th day of September 1973

Robert L. Danner, Jr.

ORDER

The defendants having moved for a stay of execution of, or any proceedings to enforce, the judgment entered in the above entitled cause pending the defendants' appeal to the Supreme Court of the United States.

IT IS ORDERED that execution of, or any proceedings to enforce, said judgment be and the same is hereby stayed until the defendants' appeal to the Supreme Court is disposed of.

John Minor Wisdom
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this 5th day of September, 1973

Robert H. Mabry

U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED SEP 7 1973

BENJAMIN W. REISCH
CLERK

MINUTE ENTRY
SEPTEMBER 7, 1973
RUBIN, J.

MARSHA B. HEALY,
SUZANNE D. HILL,
CAROLYN HALL,
LINDA WALZ,
CHARLES W. HILL,
JERRY A. WALZ and
JOHN J. HEALY

versus

HON. EDWIN EDWARDS, GOVERNOR
OF LOUISIANA,
HON. THOMAS W. TANNER,
HON. WALLACE A. EDWARDS,
HON. HILLARY J. CRAIN, Judges
of the 22nd Judicial District
Court,
DELOS FUSSELL,
A. B. CROW,
BILLY W. WEAVER,
ROBERT FITZMORRIS,
VICTOR GRANTHAM; all defendants
are sued both in their official
and individual capacities

CIVIL ACTION

NO. 73-688

SECTION "C"

***

In the opinion dated August 31, 1973, on page 5, paragraph 3, line 3, "seven" should be "eight".

John Minor Wisdom
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT JUDGE

R B
UNITED STATES DISTRICT JUDGE

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DATE OF ENTRY 9-10-73

U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
FILED 9-7-73
BENJAMIN W. REISCH
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY,
SUZANNE D. HILL,
CAROLYN HALL,
LINDA WALZ,
CHARLES W. HILL,
JERRY A. WALZ and
JOHN J. HEALY

CIVIL ACTION

NO. 73-688

SECTION "C"

VERSUS

HON. EDWIN EDWARDS, GOVERNOR
OF LA.,
HON. THOMAS W. TANNER,
HON. WALLACE A. EDWARDS,
HON. HILLARY J. CRAIN, Judges
of the 22nd Judicial District
Court,
DELOS FUSSELL,
A. B. CROW,
BILLY W. WEAVER,
ROBERT FITZMORRIS,
VICTOR GRANTHAM; all defendants
are sued both in their official
and individual capacities

AMENDED JUDGMENT

The Judgment of August 31, 1973 is amended to read as follows:

"This matter came on for hearing on a previous day, and for the written reasons on file herein,

"IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs, Marsha B. Healy, Suzanne D. Hill, Carolyn Hall, Linda Walz, Charles W. Hill, Jerry A. Walz and John J. Healy, and against defendants, Hon. Edwin Edwards, Governor of Louisiana, Hon. Thomas W. Tanner, Hon. Wallace A. Edwards, Hon. Hillary J. Crain, of the 22nd Judicial District Cou-t, Delos Fussell, A. B. Crow, Billy W. Weaver, Robert Fitzmorris and Victor Grantham, declaring the Louisiana Jury Selection System whereby women may not serve on juries without filing a written declaration of their desire to do so unconstitutional and defendants are hereby enjoined from enforcing

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Y
CERTIFIED
HEARING
DATE OF ENTRY 9-10-73

the constitutional and statutory provisions declared to be unconstitutional."

Dated at New Orleans, Louisiana, this 7th day of September, 1973.

John Minor Wisdom
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT JUDGE

R. T. Beer
UNITED STATES DISTRICT JUDGE

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FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
SEP 18 2 16 PM '73
BENJAMIN W. REISCH
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A WALZ and JOHN J. HEALY, Plaintiffs, versus HON. EDWIN EDWARDS, GOVERNOR OF LOUISIANA, HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL, A.B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM: all defendants are sued both in their official and individual capacities, Defendants	CIVIL ACTION NO. 73-688 SECTION "C" (THREE-JUDGE COURT CASE)

NOTICE OF APPEAL

Defendants, Honorable Edwin Edwards, Governor of Louisiana, et al., through the Honorable William J. Guste, Jr., pursuant to 28 U.S.C.A. §1253, hereby give notice of their appeal to the Supreme Court of the United States from the Court's judgment entered on September 4, 1973.

RESPECTFULLY SUBMITTED:

WILLIAM J. GUSTE, JR.
Attorney General

Warren E. Mouledoux
WARREN E. MOULEDOUX
First Assistant Attorney General

FEE $ 5.00
PROCESS
CHARGE
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ORDER
HEARING
DOCUMENT No. 33

DATE OF ENTRY 9-18-73

Robert L. Danner, Jr.
ROBERT L. DANNER, JR.
Special Counsel

Dale C. Wilks
DALE C. WILKS
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2-3-4 Loyola Building, 7th Floor
234 Loyola Avenue
New Orleans, Louisiana
527-8375

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this 12th day of September, 1973

Robert L. Danner, Jr.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY,

Plaintiffs,

versus

CIVIL ACTION NO. 73-688

SECTION "C"

(3-JUDGE COURT CASE)

HON. EDWIN EDWARDS of LOUISIANA
HON. THOMAS W. TANNER,
HON. HILLARY J. CRAIN,
JUDGES OF THE TWENTY-SECOND JUDICIAL DISTRICT COURT,
DELOS FUSSELL,
A. B. CROW,
BILLY W. WEAVER,
ROBERT FITZMORRIS,
VICTOR GRANTHAM;

Defendants,

(All Defendants are sued in their official and individual capacities.)

(TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause, held in the Courtroom, 400 Royal Street, New Orleans, Louisiana, on July 6, 1973, before the HONORABLE JOHN MINOR WISDOM, HONORABLE ALVIN B. RUBIN, and the HONORABLE R. BLAKE WEST, Judges presiding .)

APPEARANCES:

GEORGE M. STRICTLER, JR., ESQ.
1110 Royal Street
New Orleans, Louisiana

AND

MS. RUTH BADER GINGSBERG
ATTORNEYS FOR PLAINTIFFS.

ROBERT DANNER, ESQ.
REPRESENTING The State of Louisiana.

REPORTED BY:

GARY DAVIS
Official Court Reporter

PROCEEDINGS

JULY 6, 1973.

JUDGE WISDOM:

Be seated, please.

We have specially fixed today the case of Healy against Edwards.

Will counsel please state their names and whom they represent.

MR. STRICTLER:

My name is George Strictler. I represent the Plaintiffs, and I'd like to introduce to the Court Ms. Ruth Gingsberg. She is a member of the Bar of the State of New York, Second Circuit, and she will argue the case for the Plaintiffs with the Courts' permission.

JUDGE WISDOM:

Very well. We welcome Ms. Gingsberg as counsel.

MR. DANNER:

My name is Robert Danner, and I am here on behalf of the State of Louisiana.

JUDGE WISDOM:

Now, we have a stipulation in the record. Is it also understood and stipulated that this will serve on the hearing for a temporary restraining order and preliminary and permanent injunction?

MR. DANNER:

Yes.

MS. GINGSBERG:

Yes.

JUDGE WISDOM:

Is there any evidence to be introduced?

MR. STRICTLER:

No.

JUDGE WISDOM:

Very well.

Let me ask you first how much time will you require for argument?

Did you concur in the stipulation?

MR. DANNER:

Your Honor, our office originally concurred, however, we would like to point out the points that we would like this court to consider in the stipulation.

JUDGE WISDOM:

Let's do that right now for the record. Let's consider the points you want us to consider in regard to the stipulation.

You do agree that this hearing will serve as the hearing on both the preliminary and permanent injunction?

MR. DANNER:

Yes, sir.

THE COURT:

All right.

Tell us what you want us to consider.

MR. DANNER:

Yes.

Your Honor, originally we agreed that there was no question as to Class 2 Plaintiffs in the case. However, with second thought and due consideration, we have determined that there are important issues which this Court should decide.

First of all, in regards to the female plaintiffs, we believe that their class definitely has to be defined for the following reasons:

We believe that there are possibly three classes of female plaintiffs. One class conceivably consists of women who -- who want to be on juries but do not want to have to sign up for such.

The second class we believe are women who want to be on juries and do not mind placing their names on the clerk's list.

The third class we believe are women who do not care to be on juries at all in Louisiana.

For our -- the basis for this is substantiated in the case of Ward vs Luttrell, 292 Fed. Supplemental, 165, 1968, which case out of this district.

THE COURT:

What is the Page number?

MR. DANNER:

Ward vs Luttrell, L-U-T-T-R-E-L-L, 292 Fed. Supplement, 165.

This case was decided from this district in a -- and a member, one of the members of this panel, was a member on that panel which decided that case which dealt with maximum work hours for women in Louisiana. The Court found that the class, that the representative party before the Court at that time could not fairly and adequately protect the interest of the class and, therefore, the Court dismissed the class action.

In regard to the male claim, in light of Article 4 of the Louisiana Criminal Code as amended, Section 5, we do not believe that these male plaintiffs represent all the males because Section 5043, Article 403, provides that once you serve on a jury, you have an exemption for three years, which goes against their argument relating to the disportionate burden that they are suffering.

JUDGE WISDOM:

Are you telling me now that you changed your mind about the stipulation as to class?

MR. DANNER:

That's correct, Your Honor.

JUDGE WISDOM:

And that you think that the Plaintiffs are not representative of the class as you would define them, that there are three sub-classes, is that it?

MR. DANNER:

That's correct as in regard to the female plaintiffs.

JUDGE WISDOM:

With regard to the women?

MR. DANNER:

Yes, sir.

JUDGE WISDOM:

And as to the men?

MR. DANNER:

Well, we think there is a question on what class they represent in light of the exemption provided in Article 403, Section 5 of the Louisiana Criminal Code .

JUDGE WISDOM:

In view of the fact that they are exempted for three years if they have served; is that correct?

MR. DANNER:

That's correct.

JUDGE WISDOM:

You would carve out those men as an exception to the class?

MR. DANNER:

Well, I would think --

JUDGE WISDOM:

You would think it would destroy the class?

MR. DANNER:

I would think it would. There is a possibility it might destroy the class.

JUDGE RUBIN:

I want to be sure I understand what you are saying. I don't believe there is any part of the stipulation that relates to the class action, is there?

MR. STRICTLER:

No, sir, there is not, Your Honor.

JUDGE RUBIN:

I think insofar as you suggest that you want to withdraw from something that's stipulated, I don't find anything in the stipulation that is in any way contradicted by anything you have suggested.

Now, it's true that, as a preliminary matter and acting within the jurisdiction that I thought reposed in the one judge, who convened in the Court, I did find the matter was appropriate for class action, but that was after notice and a hearing and not based

on a stipulation. Although I think the record will also show there was no objection made at the time.

Now, first let's be sure. Is there anything in the stipulation that you wish to withdraw from? Would you examine the stipulation of facts and see if it still represents what is stipulated?

MR. DANNER:

Okay.

MR. STRICTLER:

Your Honor, while Mr. Danner is examining the stipulation, I would like to call the attention of the Court to the fact that at the prior court's hearing defining the class, Defendants filed a memorandum on June 8, and I quote from that memorandum:

" With respect to definition class, that Plaintiffs purport to represent, Defendants recognize and acquiesce to the validity of the female resident of the Twenty-Second Judicial District who are eligible for jury service under Article 401 of the Louisiana Code of Criminal Procedure but who are exempted from serving under Article 406.

Therefore, because of the relief requested by this class will, if granted, dispose of the issues of relief prayed for by the male class and female sub-class, Defendants believe that no useful

purpose would be served by requiring further definition of the class."

There was not only no opposition to the Court's ruling in that matter, there was a prior consent, specific consent, that's in the memorandum filed June 8 entitled "Memorandum of Defendants with respect to definition of the classes in absence of notice requirement" --

JUDGE RUBIN:

Mr. Strictler, did you not after that hearing prepare an order?

MR. STRICTLER:

Yes, sir, I did.

JUDGE RUBIN:

I don't seem to find it in the record and I wondered if perhaps the clerk had misplaced it. It seems to me I recall signing it.

MR. STRICTLER:

Yes, sir, the pre-trial order, and that was approved both by myself and Mr. Dale C. Wilks.

JUDGE RUBIN:

In the pre-trial order rather than in a separate order?

MR. STRICTLER:

It's a pre-trial -- there is an order -- oh, I am sorry, Your Honor, not in the pre-trial order, but there--

not only in the pre-trial order, but there is also an order dealing with intervention and definition of class.

JUDGE RUBIN:

That's the order that I had reference to. What is the date on that?

MR. STRICTLER:

Your Honor, I don't have a copy of the order signed, so I don't know what the date is that it was signed.

JUDGE RUBIN:

Do you recall about what date you submitted it?

MR. STRICTLER:

I submitted it on June 22, the day of the deadline.

I also --

JUDGE RUBIN:

All right, I have it. It was filed in the record, I believe, I think I have it here but I will find it.

MR. STRICTLER:

And, Your Honor, the second paragraph of the pre-trial order, which is an agreed order between myself and Mr. Wilcox of Mr. Danner's office, we reached an agreement which specifies that the two classes and one sub-class defined in Paragraph 5 of the amended complaint of the Plaintiffs' intervention--

JUDGE RUBIN:

That order was dated, so that the record may be complete, June 28, 1973, and it both determined that this was a proper class action, defined the classes, and permitted the amended complaint to be filed and the intervention to be filed.

MR. STRICTLER:

That order, Your Honor, was also submitted to the counsel for Defendant and they approved it before I ever submitted it to the Court.

JUDGE RUBIN:

Mr. Danner, have you had a chance to check the stipulation to see if there was anything in the stipulation you do not agree with?

MR. DANNER:

Your Honor, I cannot find my copy.

JUDGE RUBIN:

Here is one you might look at if you like.

(Document to Mr. Danner after which time, the following proceedings are had:)

MR. DANNER:

Well, so far as any opposition to the stipulation, I do not have any per se.

JUDGE RUBIN:

As I understand it, really then what we might say is that, although the Court has defined the class, you

request a re-definition as rule 23 does permit.

MR. DANNER:

That's correct.

JUDGE RUBIN:

It permits the Court at any time, having defined the class, later to change its mind and re-define it; is that correct?

MR. DANNER:

That's correct.

JUDGE WISDOM:

You may proceed with your argument.

MS. GINGSBERG:

If I might just preliminarily say something about this class status. There is a case very closely in point, Johnson Against Rockerfellow, 58 Fed. Rules Decision, 42, Southern District of New York, 1972, supplemented in 1973.

JUDGE WISDOM:

What is the page number?

MS. GINGSBERG:

42, 58 Fed. Rules Decision, 42.

In a pre-trial decision in that case, it was a case attempting to invalidate New York's Civil Debt Law, and the class consisted of all persons in New York prisons who then had or might in the future have a

cause of action that they wished to pursue.

An argument was made that some prisoners might prefer to wait until they get out of prison and, therefore, were not proper -- properly represented in the class action.

The judge said that that issue was one that went to the merits of the claim of a denial of equal protection and not to the propriety of class action status. Obviously they never -- no selected declaration of unconstitutionality. If the law is unconstitutional, it is inevitably unconstitutional as to all members of the class.

I would like to address first the issues of Plaintiffs' standing to sue and then the merits of Plaintiffs' claim.

This is an action to challenge the mandatory exemption of women from jury service under Louisiana Law.

Outstanding generally it is Plaintiffs' position that they and the classes they represent are subjected, to their detriment, to dissimilar treatment solely on the basis of their sex, and that this dissimilar treatment violates the 14th amendment guarantee of equal protection safeguarded to all persons, male and female, alike.

The test for standing in a controversy of this kind,

according to the controlling Supreme Court precedent, is two-fold:

First, the interests sought to be litigated must arguably fall within the zone protected by the constitutional guarantee invoked.

And, second, Plaintiffs must allege that the legislation has -- has caused or will be caused or will cause them injury in fact, injury that need not be economic.

Unquestionably the interest asserted by Plaintiffs here fall within the zone protected by the 14th amendment equal protection guarantee. Dissimilar treatment of men and women has been declared unconstitutional.

JUDGE WISDOM:

Ms. Gingsberg, do you perceive any difference in the criteria in standing to sue whether the action be based on equal protection or due process?

MS. GINGSBERG:

No, I don't think that there is a difference in determining the question of whether the litigance can present that claim.

JUDGE WISDOM:

Other than the first half, I think the first half of it does present some sort of classification question,

that is whether there is an arguable protection.

MS. GINGSBERG:

Yes.

JUDGE WISDOM:

Taken as a whole, there you would draw no distinction between whether the claim is due process or equal protection?

MS. GINGSBERG:

I do not, and I don't think the Supreme Court has.

JUDGE WISDOM:

It seems to me the Supreme Court has drawn such a distinction. A claim under the equal protection clause must show prejudice or damage to the individual.

I am not so sure that the Supreme Court has required a showing of injury to the individual under the due process clause.

MS. GINGSBERG:

Well, we --

JUDGE WISDOM:

Now, I am not saying that what I have just said is not directed to the definition of the class but directed

MS. GINGSBERG:

Yes.

JUDGE WISDOM:

-- directed to the question of standing.

MS. GINGSBERG:

On the question of damage or prejudice to the individual, the forming of injury in fact goes through many of the Supreme Court decisions on standing.

I think that all three classes of Plaintiffs here in fact satisfy that standard.

JUDGE WISDOM:

Your contention is that there was injury to the Plaintiffs here?

MS. GINGSBERG:

Yes.

JUDGE WISDOM:

Well, whether it was under the equal -- and regardless of equal protection or due process.

What was the injury to the women as a class?

MS. GINGSBERG:

We must separate the two classes of women.

First, the more -- the larger class, that is women as potential jurors. The provisions challenged here specify that to be eligible for jury service, women must submit to a registration requirement that is not imposed on similarly situated men. The plaintiffs contend that this registration requirement causes them injury in fact by setting them

apart as subordinate citizens. The challenged provisions in effect describe two classes of adult citizens who meet the objective qualifications for the jury service.

The first class are those fully responsible for lay participation in the administration of justice, a category composed exclusively of men.

And the second, those whose participation is deemed subordinate to their responsibility at home, and this class is composed exclusively of women, including single and childless women.

Jury service, even more than the vote is at the same time a citizen's right and responsibility, a form of participation in the processes of government, an essential accoutrement of the right of litigance to an impartial jury drawn from all segments of the community, therefore, a responsibility.

JUDGE WISDOM:

Now, you are pitching your case thus far entirely on the dissimilar treatment of women.

You are not pitching it, for example, on any issue in which the public as a whole might be interested, such as the integrity of the jury system, which requires as a predicate a cross-section of the community for composition of the jury.

Do I understand you correctly?

MS. GINGSBERG:

I think that is not an accurate characterization of this claim.

Plaintiffs say, of course, standing -- we are injured in our own right, but we also raise a concern that affects the larger community, and for that reason it is all the more compelling to recognize the standing of these plaintiffs. They say they are immediately injured by being set apart as a special class that doesn't really fully -- is not expected fully to fully participate in community affairs, but the result of that, consequence of that impacts adversely on the community because it makes juries less representative. And certainly that claim comes out in connection with the women who represent litigance or potential litigance.

But the point is, in this dual right and responsibility, so far as the right is concerned, a woman's access to the right is conditioned on a registration requirement which she may never learn about, may never know she has to exercise.

And a man's opportunity for that right, if you consider it a right, doesn't depend upon his information or misinformation.

More important, though, if we look on the obligation side of it, a woman's exemption from the obligation to serve without any reason other than her status as a woman injures women as a class by typing all its members as persons not really needed for lay participation in the administration of justice.

JUDGE RUBIN:

I think what we would like to do is focus on the large class rather than the intervenor class.

How, under the test in the Sierra case --

MS. GINGSBERG:

Yes.

JUDGE RUBIN:

-- how do you find the injury in fact here?

MS. GINGSBERG:

The Supreme Court has enlightened us since the Sierra Case. Its most recent outstanding pronouncement being, with respect to all classes in this case, should be dispositive. The case is United States against Scrap, 41 U.S. Law Week, 4866, decided on June 18, 1973, after the briefs in this case were submitted.

The Court in Scrap said first that standing is not to be denied simply because many people suffer the same injury. In that case the injury was harm to

aesthetic and environmental well being.

And then the Court went on to quote with approval the formulation of standing expounded by Professor Davis, and the Court quoted these words:

"The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle. A fraction of a vote, for example, a dollar for the home tax for another. The trifle is the basis for standing, and the principle supplies the motivation."

JUDGE RUBIN:

I don't understand that you are answering my question, although perhaps you are.

Are you saying that the Sierra test is no longer used and the Scrap test antidates it, or are you saying that both under Sierra and Scrap a trifle will suffice?

MS. GINGSBERG:

I am saying that Sierra -- Scrap supplied the trifle that was absent in the Sierra Case.

JUDGE RUBIN:

What is the trifle here?

MS. GINGSBERG:

I would consider it much more than a trifle, and that --

JUDGE RUBIN:

I am going by the language you have suggested on me. It's not my language.

MS. GINGSBERG:

Well, we certainly meet that standard, but I think we would be of a more stringent standard.

The point is, look at these laws, and they say to women, well, now, you can serve if you want to, but we really don't need you to run this system.

They would not automatically exempt the men because we want them here, and it gives a message to women and it comes across loud and clear that they are subordinate so far as participation in any community affairs is concerned.

JUDGE WISDOM:

May I interrupt, and I hope you still bear in mind Judge Rubin's question.

I get the -- I draw the inference that you are primarily concerned here with the fact that women are treated dissimilarly and, therefore, placed in a subordinate position.

I am looking at it more broadly and ask, for example, whether as a member of the national community the damage is to the jury system and would you have standing as a member of the national community, whether a man or woman, to challenge this system

because it's destructive of the integrity of the Jury as representative of a cross-section of the community?

MS. GINGSBERG:

You are asking the question whether any person --

JUDGE WISDOM:

Any person.

MS. GINGSBERG:

-- a citizen would have --

JUDGE WISDOM:

Any citizen.

MS. GINGSBERG:

-- would have standing?

I think that that is a question that need not be answered in this case because we come to the group that is itself marked with this badge of second-class citizenship because they are not included.

JUDGE WISDOM:

Well, then, does that limit this class then to the treatment of women as opposed to the treatment of men?

MS. GINGSBERG:

No, certainly not.

We have a class of men who seek a certain standing on other ground beyond that.

The final thing that the Court noted in the Scrap Case is that where the community will allegedly benefit from the adjudication --

JUDGE WISDOM:

I am afraid I diverted you.

Going to Judge Rubin's question, which was, what is the injury, rather than trifle, what is the injury in the case that was absent in the Sierra Club present here?

MS. GINGSBERG:

The injury here is that women are told by this system that you are secondary participants in the community, and like it or not we regard you as persons who are first responsible at home, and then if you want to, but you really don't have to, you can serve on a jury.

JUDGE WISDOM:

Could that be treated as sort of a benign or benevolent attitude rather than an intentional injury?

MS. GINGSBERG:

As a benign classification, well, now, we are going over from standing to the merits, and I would say that like maybe ninety-nine out of a hundred classifications that were once thought designed to protect or privileg women, this one has been

recognized for what it is.

I think Justice Douglas put it best in his concurring in opinion in Alexander against Louisiana. He said quite simply this kind of a system portrays a view of woman's role that cannot stand scrutiny under today's standards. As a class not capable of shouldering the same civic responsibility as men, and to put it more bluntly, it reflects the historical --

JUDGE WISDOM:

Was that an equal opportunity case?

MS. GINGSBERG:

Alexander against Louisiana?

JUDGE WISDOM:

Yes.

MS. GINGSBERG:

No, that was a case in which the provisions we are discussing here --

JUDGE WISDOM:

Equal employment?

MS. GINGSBERG:

It was a challenge to the Louisiana jury selection system on several grounds. One on race discrimination and on sex. And I think the distinguishing issue in that case is that the Court, the majority,

decided that the selection of the Grand Jury was defective by racial discrimination and, therefore, said they did not have to go on and consider the further question of state -- of sex discrimination. That was simply the Court's usual position, customary position of not reaching out for a constitutional question that was not necessary to the decision of the case. But Justice Douglas in a concurring opinion did treat the issue of sex discrimination, precisely the issue that's before this court.

JUDGE RUBIN:

Let me put a different question to you, if I may, Ms. Gingsberg.

Suppose the Court were convinced that whatever be the standing to sue of the Plaintiffs' class, the intervenor class has standing to sue, is there any difficulty then in that class of challenging the provisions with respect to criminal juries, which are different than those with respect to civil juries since they all assert civil litigation?

MS. GINGSBERG:

Yes, our plaintiffs assert civil litigation, I think, for obvious reasons. There is a problem in coming to Federal Court when a person is involved in a

State criminal process, there may be a problem when civil litigation is going because of a strong policy of not interfering with the State judicial proceedings. That was a point that was recently made.

JUDGE RUBIN:

Certainly, there are some women that have been convicted and, therefore, don't have the problem of interference --

MS. GINGSBERG:

Yes.

JUDGE RUBIN:

-- if that were the question.

That doesn't answer the question, does it?

MS. GINGSBERG:

But it goes -- it goes much beyond the woman who is convicted.

This complex of statutes right now tells every woman in the State that you aren't in effect something less than a full adult citizen. We treat you to some extent as a child. We are protecting you against a basic civic responsibility.

JUDGE RUBIN:

Well, maybe you don't want to answer the question.

If you don't understand it, I will put it again.

MS. GINGSBERG:

Yes.

JUDGE RUBIN:

My question is, suppose the courts for some reason didn't accept that argument and said, clearly the women intervenors as a class have standing to sue. They are involved in litigation and they can have their financial interests adversely affected by not having a jury that is a fair cross-section of the populous, they are all women who are engaged in civil litigation, do we then have standing on the part of these women as litigants to attack the statutes dealing with criminal litigation?

MS. GINGSBERG:

I certainly think so.

It isn't necessary, of course, for you to decide that all three classes have standing in order to reach the merits.

It's sufficient for you to decide that one such class has standing.

In brief we refer to the few empirical studies made in the area. It shows male juries award more to males than to female jurors in personal injury claims.

And I think if we look at it in another way, if the shoe

were on the other foot, suppose Louisiana had a system in which all men were excluded from jury service except those who volunteered or blacks or blue collar workers, would there be any doubt, based on a such a system, a litigant's potential litigation, a man, a black, a blue collar worker, could legitimately object to the mandatory exemption? It works a virtual exclusion.

JUDGE RUBIN:

If that's rhetorical, I don't find it rhetorical, I don't find it self-answering.

In those cases where we have successful jury challenges, it has usually been by a defendant or by someone who can demonstrate adversity of result like a litigant.

You answered my question that assumed standing on the part of civil litigance with a civil analogy, jury verdicts.

MS.GINGSBERG:

Yes.

JUDGE RUBIN:

My question is, suppose the Court would say that there is standing to sue with respect to the attack on the civil jury proceedings, why does this give them standing to sue with respect to criminal jury

proceedings?

That's all right, I don't want to persist.

MS. GINGSBERG:

This class is designed as -- I don't think the representatives are civil litigants, I don't think the class in that manner, the class, I think, is designed -- designed as a present or potential litigant, I don't think that the complaint describes them as civil litigants.

So our main representatives are civil litigants, but I think they are -- appropriately represent litigants whether plaintiffs or defendants, whether civil or criminal proceeding.

JUDGE WISDOM:

I notice that in Justice Douglas' opinion he puts it squarely on the subject, squarely on the basis of due process, lack of a fairly selected jury. But, of course, the defendant in that case,Alexander, was a defendant who had been convicted.

MS. GINGSBERG:

Yes.

It's a different procedural posture. It was a male defendant objecting to the absence of women on the jury.

JUDGE WISDOM:

Nevertheless, he was a party -- he was a defendant and entitled to a fairly chosen jury.

MS. GINGSBERG:

Yes.

JUDGE WISDOM:

Your broad class doesn't have anybody like that, so you are driven, I guess, to equal protection.

MS. GINGSBERG:

That's correct.

Our male class are men who are claiming that they are exposed excessively to the burden of jury service. We do not have a class of male litigants. We do not have a named plaintiff in the position of Alexander. And, quite frankly, our principal thesis in the case is the denial of equal protection both for men and women.

JUDGE WISDOM:

If you are necessarily driven to that, I won't say driven, that must necessarily be your position with respect to that broad class of all women.

MS. GINGSBERG:

Yes. Yes, it is.

And I would not describe it as a position to which -- to which we were driven.

JUDGE WISDOM:

Well, I wouldn't say driven. I withdraw driven if you object to the word.

MS. GINSBERG:

Well, on the standing then on the sub-class of the women who were currently parties or who will be parties --

JUDGE WISDOM:

Are we expected to take judicial notice of the class, that is, put you in a subordinate position, put women in a subordinate position?

Perhaps the women in let's say, wherever it was, I have forgotten, Tangipahoa --

JUDGE RUBIN:

St. Tammany.

JUDGE WISDOM:

St. Tammany, that perhaps a majority of women prefer not to serve on juries.

MS. GINSBERG:

I think it's true that any group given an exemption for the asking would prefer not to serve.

JUDGE WISDOM:

Take, for example, the manual laborer who is exempted, has been exempted as a group, and yet the Court has held that that's improper.

MS. GINSBERG:

Yes.

But I think that that issue of whether people really want to qualify has come up in a number of causes of action in a number of groups. I think it is no more acceptable here.

JUDGE WISDOM:

Yes. In every case it has been by a litigant. Your plaintiffs are not litigants and you are saying that you know really what's best for them.

MS. GINGSBERG:

Not precisely.

The original suit in the case of Lipwig against Krook was, I believe, not on behalf of any litigant but on behalf of women who wish to serve on juries.

More recently, very recently, there was a decision in the middle district of Alabama, Pendergast against Eubanks, and that followed the same pattern, a class of women who wish to serve on juries.

JUDGE WISDOM:

It isn't much of a hardship to register with the clerk for those who desire to serve on juries.

MS. GINGSBERG:

It may not be much of a hardship to register, but the requirement in itself sets apart women as a class, and when we are looking on the obligation side of

this, which is particularly important for women as litigants, I think we can say that any group given the opportunity to avoid jury service would probably not flock to the courthouse to register to serve.

The standing of the male plaintiff in this case, I might point out, by the way, the defendants in their motion to dismiss and also in their formulation of the issues, do not raise any standing challenge to eitherthe class or the sub-class of female litigants who raise an equal protection objection.

Defendants do challenge, however, the standing of the male plaintiffs in that regard. And, again, I think, it is clear that under the most recent Supreme Court decisions, the male plaintiffs have alleged injury. In fact, they assert that the current arrangement subjects them to a disproportionate obligation to serve even if they have a few year hiatus because of the female exemption, whatever relief they are given, they are still carrying a double burden, and this unequal proportion of the jury causes them to lose work then and dollars and other expenditures.

JUDGE WISDOM:

Now, you do represent some plaintiffs who are litigants?

MS. GINGSBERG:

Yes.

JUDGE WISDOM:

Do we have to reach any question except that, do we have to do any more than recognize their standing to sue and then go to the merits?

MS. GINGSBERG:

With the exception of the question raised by Judge Rubin, who -- certainly, our named plaintiffs are civil litigants, but I think we have described the case as present and potential litigants without qualifying that.

JUDGE RUBIN:

They couldonly be unwilling litigants in any other matter, because in any other matter the litigant, that is the one who invokes the suit would be the--

MS. GINGSBERG:

Yes.

JUDGE RUBIN:

-- but that's all right.

MS. GINGSBERG:

I think my answer to that is that it is not necessary for you to make a finding that each of these three classes has, depending -- it's sufficient one

of them has standing to raise the issue on the merits.

JUDGE RUBIN:

I put one more question to you, and I guess Mr. Danner had best pay particular notice to this one. I think I really know what your answer would be, but would the Court be justified in assuming that the class of plaintiffs, the general class of plaintiffs embraces at least some women who are inevitably going to be defendants in criminal cases?

MS. GINGSBERG:

Yes, because the general class embraces all women in the State of Louisiana who meet the objective qualifications for jury service but who have not registered for such service. Inevitably, there will be some of those who will become defendants in criminal cases.

If I could just conclude on the standing issue.

Our position is that for each class of plaintiffs, there is a good deal more than an identifiable trifle at stake. The principle here is that equal citizenship rights and responsibilities for men and women supplies ample motive for a vigorous contest.

We are not asking this court to decide any kind of

meta abstract or ill-defined issue. The named plaintiffs represent distinct groups, each significantly affected by the challenged provisions, and their claim present a clearly focused controversy in an adversary context.

I would like to turn then to the issue on the merits.

JUDGE WISDOM:

I think we can save some time here, and the Court is in complete agreement in this, and that is that we think we understand the issues on the mertis and we were more concerned about the questions of standing.

So I dont think you really need to say anything on the merits, but if you feel you've got something in your system and you just must get it out, you may say a few words.

MS. GINGSBERG:

No, no, if the Court has no problems on the merits, I don't feel that there is anything I must get out.

I was just reviewing to see if there was something outstanding I have not said.

JUDGE WISDOM:

Well, on rebuttal, we will give you a few minutes on rebuttal if you should need it.

MS. GINGSBERG:

All right.

JUDGE WISDOM:

We will hear now from Mr. Danner.

MR. DANNER:

Yes, sir, Your Honor.

I have three points I would like to make:

First of all, in the case of Water Case, 82 Supreme Court, 159,1961, the Supreme Court of the United States held the Florida statute similar to the Louisiana statute providing an exemption for women to be constitutional. The Court held that the Florida statute granted to women the privilege to serve but did not impose such a duty. They held the Florida statute to be constitutional because the basis for the statute said women are the center of the family unit despite the economic changes at the time, and I think that theory will apply today.

Secondly, the Louisiana Supreme Court has held our jury exemption statute to be constitutional at least ten times, as noted on Page 11 of our motion to dismiss.

Further, in the case of Alexander versus Louisiana, as mentioned before, the Supreme Court of the United States had the issue of the constitutionality of

the Louisiana jury exemption statute before it but decided not to rule on the constitutionality of that statute.

So far as the case of Carter versus Jury Commissioners, 396 United States, 320, 1969, that particular case unequivocably doesn't apply to the case at bar mainly because in that case the defendants excluded the plaintiffs from the jury list.

In our situation here, we do not have a blatant exclusion. We have an exemption which was granted.

I have nothing further.

JUDGE RUBIN:

How would you answer, Mr. Danner, the question that I put to Ms. Gingsberg that I noted particularly for your attention with respect to standing to sue, and that is, if the class is composed of all women in the state, it inevitably includes some women who will be charged with crimes and some women who will be involved in civil litigation and, therefore, on behalf of at least these women the plaintiffs have standing?

MR. DANNER:

If the class included all women, I would say, yes, if that's the class, which in my opinion --

JUDGE RUBIN:

Hitherto it is unless we modify it, isn't that the one we found previously? Isn't that the way the class is now defined unless the Court changes it, all women?

MR. DANNER:

I believe that's right.

JUDGE RUBIN:

Is it justifiable for a class to litigate saying, we don't know on which of us this burden will fall but it assuredly will fall on some of us, therefore, before it falls we assert our interest in this determination. Is that a proper assertion of standing to sue?

MR. DANNER:

No, it's not, Your Honor.

I think in that instance the class could not help but represent those in fact that should be represented.

JUDGE WISDOM:

Would you concede that a litigant has standing?

MR. DANNER:

In regard to the --

JUDGE WISDOM:

Let us say a person who is in a suit either as a plaintiff or defendant in which there is to be a jury trial, does such a person have standing?

There are such plaintiffs here.

MR. DANNER:

That's correct.

I don't think so, Your Honor.

JUDGE WISDOM:

You don't think such a person would have standing?

MR.DANNER:

No.

JUDGE WISDOM:

Well, then, let me put it to you this way.

It's fundamental and has been since Trouter versus West Virginia that a jury must represent a cross-section of a community.

Very recently, last, not this June but the previous June, the Supreme Court held in Peters against Kitf that a white man had standing to challenge the Jury system on the ground of the systematic exclusion of blacks from the jury system. That was on the theory that the jury system, there was a lack of due process in that he was entitled to a fair trial, and a fair trial rests or comprehended a jury chosen from a cross-section of the community.

Now that such a person is in the position, let us say, of a man or woman who would object here to the exclusion of a large segment of the community, it

is an exclusion in fact whether you may not call it an exclusion, because the requirement is such that there is no incentive to women to register or to volunteer, and they don't volunteer, as proved by the stipulation, that less than, oh, I think two or three a term volunteered in St. Tammany. So it is factually bolstered, too, that a segment, a large segment of the community is excluded.

MR. DANNER:

In that regard, Your Honor, I think relative to due process laws, I think it would apply to a defendant in a criminal case.

JUDGE WISDOM:

Well, you are entitled to due process in a civil case, too.

But what -- I am not -- I do not mean to say there is no merit tothe equal protection argument.

It seems to me very clearly there is merit to the due process argument on the merits if there is standing to sue, and there is standing to sue if the plaintiffs, one of the plaintiffs, is a litigant.

MR. DANNER:

Well, to my knowledge, Your Honor, I don't -- I havan't heard or read a case which dealt with that particular problem.

JUDGE WISDOM:

I know you have read cases holding that segment of a community cannot be excluded even with the most benevolent motives, for example, wage earners. Wage earners. The legislature excluded wage earners because the legislature felt they should not have to sacrifice, they were not in a position to serve on juries and leave their work. That's a benign motive, but it's a large segment of the community and it cannot be excluded.

Women, as you just argued, hold the family together according to the views of some male chauvinists and, therefore, they are excluded.

It is an exclusion in fact, even though it's not couched in terms of exclusion.

MR. DANNER:

Like I mentioned earlier relative to criminal prosecution, yes, I know of authority that holds in litigation --

JUDGE RUBIN:

Well, Frontiero, which I don't think you have dealt with adequately, deals with the interest of a class of women on a civil matter, and doesn't it indicate a different criterian that the one applied in Hoit with respect to what kind of

classification may validly be drawn in civil matters?

MR. DANNER:

That's an inference to that.

JUDGE RUBIN:

With respect to what kind of a classification, I think really your argument on the merit rests fundamentally that Hoit was decided and we must follow it; isn't that correct?

MR. DANNER:

Basically, yes.

JUDGE RUBIN:

And I think there is a good deal to be said for that position if the test remained the same.

But the rationale of Hoit, as I read it, is that a certain kind of classification is justified, a classification in which there is a rational foundation or a reasonable classification. Those are the touch words.

Frontiero said, however, as I read the case, that in distinguishing between sexes there must be more than something merely a rational classification.

If that be so, isn't the foundation for Hoit gone?

MR. DANNER:

Logically --

JUDGE RUBIN:

Let me simplify it.

Do you read Frontiero as propounding a different test?

MR. DANNER:

I would think that the test in Frontiero would be more stringent, I would think.

JUDGE RUBIN:

Then don't we have to re-examine the question regardless of Hoit?

MR. DANNER:

Yes.

JUDGE RUBIN:

Now, Hoit, as I read it, is based on the notion that women, or to put it another way, woman is still regarded as the center of home and family life. In some recent government statistics, I have seen something that indicates that about sixty percent of the women of the United States between the ages of twenty-one and sixty are gainfully employed outside the home.

Could we still rely upon such an assumption, that woman is still regarded as the center of home and family life?

MR. DANNER:

If you mean by the fact there are more women employed,

therefore, they are not still the center of the family unit, I would say yes.

If you think the mere fact that employment, increase in employment takes away their function as a member of the center of the family, I would say yes.

JUDGE RUBIN:

Well, it might leave woman as the center of the family except between the hours of nine to five if sixty percent of the women find it convenient to be absent doing whatever kind of job they do, they could equally do the job of a juror.

In fact, I frequently tell them if they can go and be a clerk in Maison Blanche, they can serve on the jury.

What I am saying is, didn't the Court in Hoit really base their assumption on an economic notion to which they accorded judicial notice that is no longer viable?

MR. DANNER:

Your Honor, if I remember correctly, the Court did consider the fact that women in 1961, at least the employment range at that time talking about women at that time in 1961 had increased. I believe the language, I can't quote the exact language, but the Court did take cognizance of the fact that al-

though women were participating more in the economy that -- that it was the opinion felt by the Court that woman was still the center of the family. I don't think they disregarded the fact that there were more women working today than in 1961.

JUDGE WISDOM:

I would like to suggest this to you, the Supreme Court already expressed itself and expressed itself thirty years ago that the exclusion of women from jury panel was irrational, and the Court said the jury was not limited -- that was Ballard against Ballard, or it was a case decided under the Supreme Court's supervisory power, but it certainly is an expression then of the Court's view of the rationality of the exclusion of women. And the Court said the jury is not limited to the defendant. There is injury to the jury system, to the laws and institutions, to the community at large and democratic ideal reflected in the processes of our courts. And it seems to me this is a clear expression of the Supreme Courts' view of what is rational and what is irrational and was not overturned by Hoit.

And my real problem is with the question of standing, because I think there is standing with regard to

women as a class.

I don't have much trouble when the standing can be recognized, as in the case of a party litigant. And I would like to hold that, I'd like to be able to overrule Sierra. I can't quite do that.

MS. GINGSBERG:

Sir --

JUDGE WISDOM:

Maybe I can distinguish it, but that's not for you, that's for Ms. Gingsberg.

JUDGE RUBIN:

Let me suggest to you really if you do want to file a supplemental brief on this, we will be glad to let you do it. But if we set side by side the text of Sierra and a text of Hoit, we really do have some difficulty in reconciling it.

In Hoit, the Court said, for example, one of the reasons the State can justify this system of asking women to volunteer for jury service and not asking men to do it, which amounts, of course, to a type of exclusion, is because of a determination -- I am reading from Page 164 of the Supreme Court Reporter-- because of a determination that it would not be administratively feasible to decide in each individual instance whether the family responsibility

of a prospective female juror were serious enough to warrant an exemption.

Now, turning to Frontier, reading from 41 Law Week 4613: any statutory scheme which draws a sharp line between the sexes solely for the purposes of achieving administrative convenience necessarily commands similar treatment for women. Therefore, arbitrary choice is forbidden by the constitution. So we have identical language with a reverse result.

And I think for the Court to accept your position on the merits, we would have to be shown some reason why that language in Frontiero doesn't in effect withdraw the basis for the classification made in Hoit.

If you want to wrestle with it in a supplemental brief, I think we will be glad to see it, but I think you have to wrestle directly where it is. I don't think you can sidestep it.

MR. DANNER:

If the Court so desires.

JUDGE RUBIN:

If you think you have more to say, we don't want you to file more paper just for the sake of using up some of that scarce commodity.

JUDGE WISDOM:

Do you have anything further?

MR. DANNER:

No, Your Honor.

JUDGE WEST:

I would just like Ms. Gingsberg to comment on Hoit, if you would, please.

MR. DANNER:

Thank you.

MS. GINGSBERG:

The Hoit decision did uphold a statute very similar to this one in 1961.

Florida appealed that law in 1967.

Louisiana is the only state in the union left with such a law, but, of course, the measuring line used by the Supreme Court in 1961 in Hoit is a very different standard than the one that they use today, not only in Frontiero but perceptive readings, reading as we saw that that was coming at the time of Hoit, there was an unbroken line of precedent in the Supreme Court starting from the 1860s, the legislature could draw a sharp line between sexes and the Court was not going to do anything about that. Gross generalities were permitted.

But in 1971, we had Reed against Reed, and in 1972,

Stanley against Illinois, the unwed father who claimed a right to parenthood of his children, there was a right to unwed mothers only. So it's not simply equality for women, it's a two-way street here. Reed was first, Stanley against Illinois was next.

Of course, many lower court decisions back this up. And then finally, and most spectacularly Frontiero against Richardson, that's a case that made it clear that unequal treatment wouldn't be tolerated, and the statute there was based on the very same kind that's involved -- well, most women stay home so we will automatically get the many service benefits for their wives, assumed to be interested, but most men work to service women. The same kind of dichotomy, the same way in looking at the words in Frontiero. And more than that, at the time of Hoit, the Court was able to say there are many other states that brought in -- or similar distinctions classify those standards that they refused to in an earlier case, Fey against New York. Many, many cases at that time had a similar pattern. Frontiero against Richardson, dealing with a statutory pattern that was pervasive. Still it runs through hundreds of federal state

laws, and that was no secret to the Supreme Court because the solicitor general made that very plain, and yet they struck down that differential. In any event, the counts on Hoit would work the other-- those counts would work the other way. Louisiana is the only state left with such a statute.

JUDGE WEST:

Thank you.

MS. GINGSBERG:

If I may just make a footnote to the Sierra Club decision. I think that it has been substantially elaborated or qualified, depending on how you would like to classify it, by United States against Scrap. Sierra Club is the only group inside, that the members of your club are using their facility, you would have made it, you would have had standing, but coming to us with an abstract question not alleging any abuse by your -- any injuries by your members and just expecting us to --

JUDGE RUBIN:

Mr. Justice Brannan said that in a concurring opinion, I suggest they go back and amend and simply say that.

MS. GINGSBERG:

The Scrap Case was one student group, environmental

defense fund, the two plaintiffs, just that little more in the case, not very much more, it was heavy weighted, but it was enough. The Court said, I wanted to --

JUDGE WISDOM:

Let me ask you this.

In the language of Frontiero, which refers to it as invidious, the classification as invidious, does that mean that we say there is a presumption of injury as there is we will say in a case where there is racial discrimination?

MS. GINGSBERG:

Yes.

JUDGE WISDOM:

In other words, we would not use the rationale test but would have to use compelling State interests tests?

MS. GINGSBERG:

Yes.

I think it's plain, even after Reed, a number of courts recognize no longer any minimal rationale comparable to sex classifications.

The Second and Fourth Circuits had come out with midway tests, say something more than rational and -- I can't distinguish the two words --

JUDGE WISDOM:

It may really be a question of playing with words there, but the effect is different.

MS. GINGSBERG:

Yes.

JUDGE WISDOM:

If we can presume injury, for example --

MS. GINGSBERG:

It's very clear in Justice Brannan's opinion he would treat a sex classification as he would treat a classification based on national origin. The burden is on the proponent to justify it.

Incidentally, I was technically incorrect, it does not include all women. Our class is all women in the Twenty-Second Judicial District. And, as Mr. Strictler has pointed out, the jury selection is the same for criminal and civil juries. So it is that selection system we are challenging here.

On the comment that Judge Wisdom made, that's a very revealing unit against Ballard.

JUDGE WISDOM:

Yes.

MS. GINGSBERG:

This is very enlightening referring to Ballard.

JUDGE WISDOM:

I saw that, I saw that I was making the same point

as I made, that it was decided under the Supreme Courts' supervisory power.

MS. GINGSBERG:

Yes.

JUDGE WISDOM:

But it still strikes me as evidence of the fact that the Supreme Court then regarded it as irrational, otherwise it would not have set it aside under the-- it would not have said what it did under the supervisory power.

MS. GINGSBERG:

Yes.

And on the question of trying to show any kind of a military convenience in the case, it would seem to me an almost impossible chore. Federal courts now have been sitting with juries composed of approximately fifty percent women and there has been no report of delay or inconvenience because they can serve on the same basis as men. I think the showing here would be far more difficult than it might have been in Frontiero had they attempted it.

JUDGE RUBIN:

I had a jury recently, Ms. Gingsberg, composed of five women of various educational attainment, all white,

and one black male truck driver. When they deliberated, who do you think was elected foreman of the jury?

MS. GINGSBERG:

I think I know.

That will take time.

JUDGE WISDOM:

Mr. Danner, do you wish to submit a supplemental brief?

MR. DANNER:

Yes, Your Honor.

JUDGE WISDOM:

How much time would you need?

MR. DANNER:

Not more than about a week.

JUDGE WISDOM:

Well, suppose we give you a week to submit a supplemental brief and then serve a copy on your opposing counsel.

And I assume you will not really require a week, nobody is taken by surprise here.

MS. GINGSBERG:

No.

JUDGE WISDOM:

Well, get in your reply brief or supplemental brief or either contemporaneously with his or after you have

a look at his within a day or two.

JUDGE RUBIN:

I think before we close this, as what might be called the originating judge, I do want to express appreciation to counsel who have been cooperative in shaping up the issues and briefing them so the Court could consider the matters expeditiously and for the stipulation which is very comprehensive and permitted a thorough airing of the issues.

JUDGE WISDOM:

I associate myself with those remarks.

JUDGE WEST:

I agree, also.

JUDGE WISDOM:

The Court is adjourned under its usual orders.

(Whereupon, Court adjourned.)

REPORTER'S CERTIFICATE

I, GARY DAVIS, hereby certify that the foregoing is a true and correct transcription of my stenograph notes taken in the Courtroom, 400 Royal Street, New Orleans, Louisiana, on July 6, 1973, before the HON. ALVIN B. RUBIN, HON. JOHN MINOR WISDOM and HON. GORDON WEST, Judges Presiding.

GARY DAVIS
Official Court Reporter